TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

October Term, [redacted]

No. [redacted]

THE UNITED STATES, [redacted]

vs.

IVER JOHNSON'S SONS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

[redacted]

(28,542)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 719.

THE UNITED STATES, PETITIONER,

vs.

IVER INGEBRETSEN NESS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December term, 1915, of said court, before the Honorable Walter H. Sanborn and the Honorable John E. Carland, circuit judges.

Attest:

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: On the fifteenth day of February, A. D. 1915, a transcript of record, pursuant to an appeal allowed by the District Court of the United States for the Northern District of Iowa, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein the United States of America is appellant and Iver Engebretsen Ness is appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its clerk, is in the words and figures following, to-wit:

1 United States of America,
Northern District of Iowa—ss:

Pleas before the District Court of the United States in and for the Northern District of Iowa, at a term begun and held in said district on the 16th day of June, 1914, before Honorable Henry T. Reed, Judge of the Northern District of Iowa.

United States of America, Plaintiff,
vs.
Iver Engebritsen Ness, Defendant.

Be It Remembered, That on the 28th day of October, 1912, there was filed in the Office of the Clerk of the United States Court in and for the Northern District of Iowa, Central Division, in the above entitled cause, the Petition in Equity of the United States of America, which said Petition is as follows:

(Bill of Complaint.)

In the District Court of the United States in and for the Northern District of Iowa, Central Division.

The United States of America, Plaintiff,
vs. In Equity.
Iver Engebritsen Ness, Defendant.

November Term, 1912.

To the Judges of the District Court of the United States, for the Northern District of Iowa:

The United States of America, by Frederick F. Faville, the United States Attorney for the Northern District of Iowa, brings this, its bill against Iver Engebretsen Ness, a resident of Cylinder, Palo Alto County, Iowa:

And thereupon your petitioner complains that on or about the 21st day of May, 1912, the said respondent (Then and there being an alien) appeared in the District Court of Iowa, in and for Palo Alto County, and at a term and session
2 thereof then being held at Emmetsburg in said Palo Alto County, and applied to be admitted a citizen of the United States of America.

That thereupon said Court, on the said day and year last aforesaid, entered a decree purporting to admit said respondent to be and become a citizen of the United States.

That thereupon a certified copy of said decree was delivered to said respondent, said certificate of naturalization being #234506, and said respondent has ever since claimed, by virtue of said pretended decree and certificate and not otherwise, to be a duly naturalized citizen of the United States of America.

Your petitioner states that the decree aforesaid, purporting to admit the respondent to be a citizen of the United States, was illegally made, and the certificate of naturalization aforesaid was illegally procured, in that the said respondent alleged in his said petition for naturalization that he lawfully entered the United States at the port of Buffalo, New York on August 21st, 1906, which said petition was false and a fraud upon the Court granting said decree and upon this complainant in that the said respondent did not present himself before any Immigration Officer of the United States for inspection on entering the United States; and the said respondent did not, at the time of entering the United States, pay the head tax imposed upon all aliens entering the United States; and said respondent did not, at the time of entering the United States, submit himself to the medical examination required in the case of all aliens entering the United States for the purpose of domicile.

Your petitioner further charges that the said naturalization certificate was procured without compliance with the laws of the United States and particularly with the fourth paragraph of the second subdivision of Section Four of the Act of June 29th, 1906, (34th Stat. of Large, Part 1, Pg. 596) in that the said respondent did not, at the time of filing his said petition for naturalization in the said District Court of
3 Iowa in and for Palo Alto County, support the same with a certificate of arrival secured from the Department of Commerce and Labor of the United States, nor was such certificate made a part of the said petition of the said respondent at the time of filing the same, nor was the same filed with the Clerk of said Court at such time, nor had any such certificate been made a part of the said petition of the said respondent at the time that the said petition was granted and said certificate of naturalization was issued, nor such certificate of landing was ever made a part of the said petition of said respondent as specifically required by said statutes of the United States, or at the time of filing said petition of said respondent, or at any time prior to the final hearing on said petition and the granting and issuing of said certificate of naturalization.

Your petitioner further alleges that the said illegal decree of naturalization and the said certificate, as aforesaid, as the respondent well knew at the time he procured and accepted the same, were procured without a compliance with the laws of the United States, and the [existance] of the said illegal decree and certificate on its face entitles the respondent to exercise the rights of a citizen of the United States and to claim its protection, whereto he is not entitled, and to have the said decree and said certificate remain uncancelled and in force, the same to be used in fraud of the United States and of persons relying thereon as being valid and proper.

Your petitioner states that before the filing of this bill, an affidavit was executed by M. R. Bevington, an Examiner of the Division of Naturalization of the United States, showing good cause for the institution of this proceeding, which affidavit is attached hereto and made a part of this bill and marked exhibit "A".

Your petitioner therefore prays that the said respondent may be compelled to answer all and singular the premises of this bill (but not under oath—answer under oath being hereby expressly waived), and your petitioner prays that
4 the decree of naturalization aforesaid and the said certificate of naturalization be declared null and void and that the said respondent be required to surrender up to the Clerk of this Court the said certificate of naturalization so delivered to him, and that the same may be marked cancelled by the Clerk of this Court and retained in his custody, and that said respondent be forever restrained and enjoined from setting up or claiming any rights, privileges, benefits or advantages whatsoever under the said decree of the District Court of Iowa in and for Palo Alto County, or under said certificate of naturalization, and that your petitioner shall have, generally, such other and further relief as the circumstances may require.

Therefore, that your Honor will grant unto your petitioner a writ of subpoena, issued out of and under the seal of this Court, to be directed to the said Iver Engebritsen Ness, commanding him by a day certain, as provided by law, to appear before your Honor in the Court aforesaid, and then and there answer the premises and abide the order and decree of this Court.

FREDERICK F. FAVILLE,
United States Attorney.

(Answer, filed in the District Court on November 21, 1912.)

The Answer of Iver Engebritsen Ness the Defendant, to the Bill of Complaint of the United States of America, Plaintiff.

This Defendant now and at all times hereafter, saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised, it is material or necessary for him to make answer to, answering says:

I.

It is true that this defendant on or about the 21st day of May, 1912, appeared in the District Court of Iowa in and for Palo Alto County, Iowa, and at a regular term and session thereof, then being held at the city of Emmetsburg in the said County of Palo Alto and State of Iowa, he applied to be admitted as a citizen of the United States.

That said application was made in the usual form, and this defendant says it is true that there was not at the time of the filing of the petition for naturalization in the District Court of Iowa in and for Palo Alto County, a certificate secured from the Department of Commerce and Labor of the United States and attached to said petition or made part thereof, For greater certainty this defendant craves leave to refer to the said petition for naturalization.

II.

Further answering, the defendant says that it is true that on or about the said 21st day of May, 1912, the said District Court of Palo Alto County, Iowa, made, entered and rendered a decree and judgment admitting this defendant to become a citizen of the United States of America. And this defendant says that the said decree and judgment was so made, rendered and entered upon consideration of the petition of the said Iver Engebritsen Ness, this defendant, and upon consideration of affidavits which were produced and offered in support thereof, and upon consideration of oral testimony which was then and there taken in open court, and upon consideration of all of the issues in said cause including the objections which were made by the duly authorized attorney and agent of the said United States.

6 III.

That pursuant to the provisions of Section Eleven (11) of the Act of Congress of June 29, 1906, and other sections and provisions of the said act and other acts of Congress, the said plaintiff did appear before the District Court of Palo Alto County, Iowa, then and there exercising its jurisdiction in said naturalization proceedings concerning matters touching and affecting the right of this defendant to admission to citizenship, and in said proceedings having so appeared, the plaintiff did file written objections for the purpose of presenting to said court the issue which is now sought to be presented by the present bill as to the right of the said Iver Engebritsen Ness to be admitted to become a citizen of the United States of America, and thereby as a result of the said appearance and filing of the said objections by the said plaintiff, it became and was an issue in the said judicial proceeding, to-wit: The said District Court of Palo Alto County, Iowa, as to whether the said Iver Engebritsen Ness was entitled to be so admitted to become a citizen; and the said issue was fully and finally adjudicated, decided and determined by the said Court, to-wit, the District Court of Palo Alto County, Iowa, then and there having full jurisdiction to decide and determine the said issue, which said determination, decision, judgment and decree has never been appealed from or set aside.

IV.

Further answering the said bill, this defendant says that it is not true that the certificate of naturalization described in the said bill was illegally procured, and he denies that he made any false statement in his petition for naturalization;

"Fourth; I emigrated to the United States from Stavange, Norway on or about the 6 day of November Anno Domini 1905, and arrived in the United States at the port of Buffalo, New York on the 21 day of August, Anno Domini 1906 on the Grand Trunk Railroad."

7 And this defendant denies the charges and claims in said bill wherein it is averred that the said petition was false or fraudulent upon the court granting said decree or upon the said complainant.

V.

And the defendant says it is true that he did come regularly through the said port of Buffalo, New York. That it is true that he was not inspected and did not pay a head tax at the time he came through the said port. But that said failure to

so inspect this defendant or to exact the said head tax was wholly and entirely due to the negligence of the immigration officials and was in no respect due to any fault of this defendant; and that because of the facts herein set out, the said defendant could not furnish a certificate of landing so issued at the said port of Buffalo.

The defendant further says that in response to the advices of agents of the said complainant, he appeared before the immigration inspector at Minneapolis, Minnesota, and submitted himself for inspection and tendered the head tax, and that he has at all times been ready and willing, and is still ready and willing and tenders the payment of the head tax as required by the said Acts of Congress. And this defendant says that he was at the said port of Buffalo, ready and willing to submit himself to any medical examination required, and was then and there present and presented himself ready to submit to such medical examination. And the defendant says that any failure to be so examined was due to the negligence of the immigration officers of the United States at said port of Buffalo and to the oversight of such immigration officers and not to any fault of this defendant.

VI.

The defendant further says that he petitioned for naturalization and filed his petition in good faith, and ardently desired to become a citizen of the United States and being in every way qualified to become such citizen.

8 That no false testimony of any kind or false statements were made by this defendant or by any witness who appeared for him. That he fully disclosed to the agents of the United States, all of the facts within his knowledge in regard to his landing and in reference to all matters complained of in the said complainant's bill. That the agents of the said United States were fully advised of all of the facts in reference thereto, and being so advised, did appear in response to the said petition, filing objections thereto, which said objections were in the nature of pleadings, and which objections for greater certainty this defendant craves leave to produce at any hearing of this bill.

That thereby, the said complainant elected to, and did litigate the right of this defendant to the decree and judgment which was entered and to be admitted as a citizen of the United States, in the said District Court of Palo Alto County, Iowa. That said proceedings then and there had were judicial proceedings in which there were as herein set out pleadings, parties and witnesses. That the said United States, its of-

ficers and agents, had full knowledge and notice of all of the said proceedings.

And this defendant denies all and all manner of fraud, misconduct or illegality in the said petition for naturalization or in the said proceedings in the District Court of Palo Alto County, Iowa, wherewith he is by the said bill charged without this, that there is in any other matter, cause or thing in the said Plaintiff's bill of complaint contained, material or necessary for this defendant to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things, this defendant is ready and willing to aver, maintain and prove as this Honorable Court shall direct, and humbly prays to be hence dismissed with his reasonable charges in this behalf most wrongfully sustained.

KELLEHER & O'CONNOR,
Solicitors for Defendant.

D. M. Kelleher,
Counsel.

9 State of Iowa,
County of Palo Alto—ss.

Iver Engebritsen Ness Makes solemn oath and says:

I am the above named defendant. So much of the foregoing Answer as concerns my own acts and deeds, is true to the best of my own knowledge; and so much thereof as concerns the acts or deeds of any other person or persons, I believe to be true.

IVER ENGEBRITSEN NESS.

Subscribed and sworn to by Iver Engebritsen Ness, before me and in my presence this 20th day of November, A. D. 1912.

(Seal)

T. F. RUTLEDGE,
Clerk, District Court in and for Palo Alto County.

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10 (Motion to strike Parts of Answer, filed in the District Court on March 14, 1913.)

Now, this day comes the plaintiff and moves the Court to strike from the answer of the defendant filed in the above entitled cause the affirmative defenses pleaded therein as follows:

To strike all of Division 3 of the said answer of the defendant for the reason that the allegations therein contain fail to set forth matter sufficient to disentitle plaintiff to the relief sought in the bill, or to constitute any legal defense to the plaintiff's cause of action, or to allege facts showing that this Court does not have full jurisdiction to hear and determine the action in controversy in this action.

To strike all of Division 5 thereof for the reoson that the same does not constitute any defense to the matters set out in the plaintiff's bill, and the said matters alleged could not legally excuse the defendant from paying the head tax as provided by law, nor would said matters confer jurisdiction on the Court issuing said certificates of naturalization until the affirmative showing of the payment of said head tax was made in the petition of the defendant for naturalization, as required by the laws of the United States.

To strike Division 6 of the answer of the defendant for the reason that the same is the pleading of immaterial, irrelevant and redundant matter and the facts therein stated do not constitute any defense to the plaintiff's bill.

FREDERICK F. FAVILLE,
United States Attorney.

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11 (Memorandum and Order upon overruling of Motion to strike Parts of Answer, filed in the District Court on January 12, 1914.)

Suit by the Government to set aside and cancel a certificate of naturalization issued to the defendant by the state district court in Iowa upon the alleged ground that the certificate was fraudulently and illegally procured by the defendant.

The defendant by answer denies the allegations of fraud and illegality in procuring the certificates, and by divisions 3, 5, and 6 of its answer alleges that the Government appeared at the hearing in the state court of defendant's petition to be naturalized, and raised the same questions upon which it seeks in this case to set aside the certificate of naturalization, and is now estopped from again litigating such questions.

The Government moves to strike said three divisions of the answer upon the ground in substance that they present no defense to the bill.

The motion of the Government is overruled as to each of said three divisions of the answer, with leave however to

present the same questions upon the final hearing if it shall deem it advisable to do so.

It is ordered accordingly, and the Government excepts.

HENRY T. REED,
Judge.

Dated January 12, 1914.

(Order appointing Guardian ad litem for the Defendant and Submission of Cause, etc.)

And on the 17th day of June, 1914, the said cause comes before the Court in progress of the trial thereof, the plaintiff appearing by F. A. O'Connor, United States Attorney and M. R. Bevington, Chief Naturalization Examiner, and Defendant by his counsel, Kenyon, Kelleher and O'Connor, and it being made to appear by certificate on file with the Clerk of this Court that the defendant is insane it is ordered that D. M. Kelleher be appointed Guardian ad litem for said de-
12 fendant. Thereupon the evidence was presented and said cause argued and submitted. Counsel for the Government was given thirty days from said date within which to file memorandum of points and authorities and serve same upon Defendant's Guardian ad litem, and said Guardian ad litem was granted thirty days thereafter to file and serve memorandum of points and authorities on Government's counsel, and thereupon the said case was taken by the Court under advisement.

Thereafter, to-wit, on the 17th day of October, being a regular day of the June, 1914 term of said Court, the said presiding Judge, Honorable Henry T. Reed, made and filed his opinion and ruling in said cause, dismissing the petition of plaintiff and rendering judgment against said plaintiff for costs and at the same time filed in said cause the following:

Opinion.

F. A. O'Connor, U. S. Attorney and M. R. Bevington, Chief Naturalization Examiner, appearing for the United States;

Kenyon, Kelleher & O'Connor, for the Defendant.
Reed, District Judge.

This is a suit in equity by the Government under Sec. 15, of the Naturalization Act of Congress approved June 29, 1906 (34 St. C. 3592 p. 597) to cancel and set aside a certificate of naturalization issued to the defendant by the district court of Iowa in and for Palo Alto County on May 21, 1912,

upon the alleged grounds that it was procured from said court by the fraud of the defendant and illegally, because the petition for naturalization at the time it was presented in the state court, nor at any time prior to the hearing thereon, was not supported by a certificate of the Department of Commerce and Labor of the United States as required by said Naturalization Act; that the defendant did not submit to a
13 physical examination and pay the required head tax on entering the United States; and that the certificate issued to defendant is void.

The defendant in answer to the bill alleges in substance that the Department of Commerce and Labor directed its chief naturalization examiner to appear in the state court at the time fixed for the hearing of the petition and object on its behalf to the granting of the petition (which he did) upon the grounds alleged in the bill for setting aside and cancelling the certificate; which opinion it is alleged was overruled by the state court and upon hearing the evidence admitted the defendant to citizenship and granted to him a certificate thereof in due form; that such judgment and decree of the state is res adjudicata and cannot be called in question in this proceeding.

The failure to submit to a physical examination and pay the required head tax is not urged in argument in behalf of the Government, and is not therefore considered.

The facts are agreed upon, were fully discussed at the bar, and many authorities have been cited by counsel in support of their respective contentions.

It would serve no useful purpose to review them and it must suffice to say, that upon a careful consideration of the facts and authorities submitted the conclusion is that the failure to attach the certificate of the Department of Commerce and Labor of the arrival of the defendant in the United States to the petition for naturalization, even if essential to prove on the hearing of the petition, was not jurisdictional; that the state court had undoubtedly jurisdiction to hear the petition as presented to it; that no fraud upon the part of the defendant in procuring the same was shown; that the failure to file the certificate with the petition was not an "illegality" with the meaning of Sec. 15, of the Naturalization Act of 1906; that the judgment of the state court is res adjudicata and cannot be rightly set aside in this proceeding.

14 Whether or not the judgment of the state court admitting the defendant to citizenship is or is not reviewable upon appeal or writ of error by some other court is quite

immaterial. Congress has conferred upon certain state courts undoubted jurisdiction to hear the applications of aliens to become citizens, and grant or deny such applications as the facts may warrant. If their judgments are not reviewable under the state practice, Congress has not provided for a review of them by some appellate court. If citizenship is granted and the judgment is not tainted with any fraud or misconduct of the party in whose favor they are entered, such judgments are final and conclusive against the attack in other courts of co-ordinate jurisdiction. See Spratt vs. Spratt, 4 Pet. 393, 408; Southern Pacific R. R. Co. vs. United States 168 U. S. 1, 48 et seq. Last Chance Mining Co., vs. Tyler Mining Co., 157 U. S. 683, 691; approved in Johannessen vs. United States 225 U. S. 227, 237, 238; United States vs. Lenore 207 Fed. 865 and cases there cited; Regulations of the Department of Commerce and Labor, November 11, 1911, bottom of page 21.

Sec. 15 of the Naturalization Act of 1906 only authorizes the annullment of judgments of naturalization when procured by fraud, or other "illegality" as distinguished from errors or procedure which would vitiate the judgments of all courts; and for this purpose only jurisdiction is conferred upon the federal courts by this section. The bill should, therefore, be dismissed and it is accordingly so ordered.

HENRY T. REED,
United States District Judge.

Filed in the District Court October 17, 1914.

(Decree, October 16, 1914.)

Now on this 16th day of October 1914 the above entitled cause having been heretofore argued and submitted to the Court, and having been by the Court taken under advisement, and the Court being fully advised in the premises;

It is ordered, adjudged and decreed, that the Complainant's bill herein filed, be and the same is hereby dismissed.

To which order and decree the Government duly excepts.

Petition for Appeal.

To the Honorable Henry T. Reed, United States District Judge:

The above named United States of America feeling aggrieved by the decree rendered and entered in the above en-

titled cause on the 16th day of October 1914, does hereby appeal from said decree to the Circuit Court of Appeals of the United States for the 8th Circuit, for the reasons set forth in the assignment of errors filed herewith and prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and document on which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals of the 8th Circuit under the rules of said Court in such cases made and provided.

Signed this 20 day of January 1915.

F. A. O'CONNOR,
United States Attorney and Attorney for the plaintiff.

Filed in the District Court January 22d, 1915.

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16 Assignment of Errors.

Now comes the complainant in the above entitled cause and files the following Assignment of Errors upon which he will rely upon his prosecution of the appeal in the above entitled cause, from the decree made and entered by this Honorable Court on the 16th day of Octpber 1914:

First. That the United States District Court for the Northern District of Iowa erred in overruling the motion to strike Divisions 3, 5 and 6 of Defendant's Answer;

Second. The Court erred in holding that the failure on the part of defendant to support his petition for naturalization with a Certificate of Arrival from the Department of Commerce and Labor of the United States, was not jurisdictional.

Third. The court erred in holding that the failure on the part of defendant to file the Certificate of Arrival of the Department of Commerce and Labor of the United States with his petition for naturalization, was not an illegality within the meaning of Section 15 of the Naturalization law.

Fourth. The Court erred in holding that a judgment of naturalization is final and conclusive against attack in other Courts of coordinate jurisdiction unless such judgment is tainted with fraud or misconduct of the party in whose favor it is entered.

Fifth. The Court erred in pronouncing judgment dismissing the bill of plaintiff.

Sixth. The Court erred in that his judgment in said cause was contrary to the law of the case.

F. A. O'CONNOR,
Attorney for Plft.

Filed in the District Court January 22d, 1915.

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17 Order Allowing Appeal.

On motion of F. A. O'Connor, United States Attorney for the Northern District of Iowa, solicitor and counsel for plaintiff, it is hereby ordered that an appeal to the Circuit Court of Appeals for the 8th Circuit from the decree heretofore filed and entered herein, be, and the same is hereby allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to the said Circuit Court of Appeals.

Dated this 22d day of January 1915.

HENRY T. REED,
United States Judge for Northern District of Iowa.

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18 Precipe for Transcript.

Comes now F. A. O'Connor, United States Attorney for the Northern District of Iowa, appearing for plaintiff in the above cause and respectfully directs the Clerk of the United States Court for the Northern District of Iowa to certify the following portions of the record which is deemed necessary for consideration of the errors assigned in the matter of the appeal in said case from the rulings, orders and decrees of the Hon. Henry T. Reed, Judge, to the United States Circuit Court of Appeals, to-wit:

1. The Petition of Plaintiff.
2. The Answer of defendant.
3. Plaintiff's Motion to strike.
4. Order of Court appointing D. M. Kelleher, Guardian ad litem for defendant.
5. Judgment, order and decree of the Court.
6. Written Opinion of the Honorable Henry T. Reed.
7. Petition for Appeal.
8. Order of Hon. Henry T. Reed granting appeal.
9. Assignment of Errors.

10. Citation and Acceptance of Service of same.

11. Bill of Exceptions.

And to the end that this cause may be reviewed on Appeal by the United States Circuit Court of Appeals, you will duly certify, as above stated the portion of the record herein indicated to the Clerk of the said United States Circuit Court of Appeals for proper preparation of a transcript of the record.

Signed this 28th day of January 1915.

F. A. O'CONNOR,
United States Attorney and Attorney for Plaintiff.

The undersigned attorneys for defendant hereby approve the application above made by the United States Attorney in behalf of plaintiff and we hereby consent and agree that the portion of the record above requested to be certified by the Clerk is satisfactory to us, and we have no request to
19 the said clerk to certify additional parts of the record, and we hereby further consent and agree that the request made in behalf of plaintiff covers such portion of the record as is necessary to present the appeal to the Circuit Court of Appeals.

Signed this 29th day of January 1914.

KENYON, KELLEHER & O'CONNOR,
Attorneys for defendant.

Filed in the District Court February 9, 1915.

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20 (Bill of Exceptions, Filed in the District Court on February 10, 1915.)

Be it remembered, that at the regular June Term, A. D. 1914, of the United States District Court for the Northern District of Iowa, Central Division, among other things the above entitled cause came on for hearing before Honorable Henry T. Reed, Judge of said Court: the plaintiff being represented by F. A. O'Connor, United States Attorney and M. R. Bevington, Chief Naturalization Examiner, and the defendant by D. M. Kelleher. The following testimony was offered; the facts in said cause were agreed upon by counsel for the respective parties and all of the evidence in said cause was reduced to writing and embodied in an instrument entitled "Agreed Statement of Facts," which statement contained all

of the evidence heard by the Court in said cause and which statement is set forth herein, to-wit:

21 Agreed Statement of Facts.

Come now the plaintiff and defendant by their respective counsel and stipulate and agree to the following statement of facts, upon which this cause is to be submitted to the court for his decision (but this stipulation shall not waive the right of either party hereto to object to any of the facts herein stated, upon the ground that the same is irrelevant, or immaterial; the purpose of the stipulation being to avoid the introduction of evidence other than contained in this stipulation.)

It Is Agreed That on January 22, 1912, the defendant filed his petition for Naturalization No. 51 in the District Court of Iowa, in and for Palo Alto County, a copy of which petition is attached to this stipulation, marked Exhibit "A" and by this reference made a part of this stipulation.

That on May 21, 1912, this petition came on for hearing before the Court aforesaid, and a Naturalization Certificate No. 234,596 was issued by the said court to defendant herein.

That prior to the hearing on the petition for Naturalization which the said defendant filed in the District Court of Palo Alto County Iowa, M. R. Bevington, Chief Naturalization Examiner of the Department of Commerce and Labor, for and on behalf of his Department, and at its direction, filed with the Clerk of the District Court in and for Palo Alto County, Iowa, aforesaid, a Motion, which was captioned: "In the District Court of Palo Alto County, Iowa, In the matter of the Petition for Naturalization of Iver Engbritson Ness", and in which motion the said M. R. Bevington for and on behalf of his Department, stated and enumerated objections to the granting of the said Petition for Naturalization, for the following reasons.

That the petition for Naturalization should not be granted, but should be dismissed upon the ground that the said Petition was not supported by a Certificate of Arrival, as required by the Second Sub-Division of Section 4, of the Natural-
21a ization Act of June 29, 1906, and in said Motion the said M. R. Bevington called to the attention of the Court certain decisions or authorities, which the said M. R. Bevington stated and contended supported his position taken in the said motion, moving and requesting the dismissal of said Petition for Naturalization upon the said grounds aforesaid.

That the said Motion was accompanied by a letter directed to the Clerk of the District Court of Palo Alto County, Iowa, which letter requested the said Clerk to call said Motion to the attention of the court at the same time the petition was presented to and considered by the said District Court of Palo Alto County, and the Clerk in obedience to the direction and request contained in said letter, did attach said Motion and Citation of Authorities to the said Petition for Naturalization, and the same was presented to the court at the same time the said Petition for Naturalization was presented to the Court and considered by it. And said Motion and authorities were considered by the District Court of Palo Alto County Iowa, and said Motion was by the said court overruled and denied, and after the evidence of the petitioner and his witnesses were heard, the prayer of the Petition for Naturalization and for a Certificate was granted by the said District Court of Palo Alto County, Iowa.

It is agreed further that the said Iver Enbebretson Ness, at the time said Naturalization Certificate was issued to him as aforesaid, and at the time of the hearing on said Petition, testified as follows; "That he emigrated from Norway, arriving at Newcastle in the province of New Brunswick, in the Dominion of Canada, on or about the 11th day of June 1906, and that he took passage on the Grand Trunk Railway from said point, and arrived at the City of Buffalo, in the State of New York through which port of entry he first entered the United States arriving at said port of entry of Buffalo on or about the 21st day of August 1906, That he remained on the same train on which he entered the said city of Buffalo and did not conceal himself therein, and that at said time and place, he saw no person on said train who was or purported to be an immigration Inspector of the United States.

21b That some time after the filing of his petition, to-wit about the month of March 1912, the said defendant was advised by a representative of the Department of Commerce and Labor, that his Petition for Naturalization was invalid, in that it did not contain or have attached thereto, a Certificate of Arrival, and thereupon that said defendant made effort to procure said Certificate of Arrival, but was advised that such Certificate could not be furnished to him for the reason that there was no record of his entry into the United States.

That defendant at the time he entered the United States was unacquainted with the laws and regulations concerning immigration to the United States, and was unacquainted with

any requirement upon the part of the railway company over which he traveled, to ascertain from him whether or not he was an immigrant, whose destination was some point within the United States of America.

That he did not know at the time of his entry into the United States of the law of the United States requiring him to pay what is known as the "Alien Head Tax" and which required him to submit to a medical examination.

That he continued on the same train through the city of Buffalo and through a part of the Dominion of Canada, and again entered the United States on said train at some point or port within the state of Michigan.

It is further agreed that the said defendant did not in fact, at any time or place, pay the Alien Head Tax or submit to a medical examination at any border port of entry in the United States.

It is agreed however, that on August 7, 1912, the said defendant presented himself before the Immigration Inspector in charge at the City of St. Paul, Minnesota, and offered to submit to a medical examination, and to pay the Alien Head Tax required by the immigration laws, but for some unknown reason, said medical examination was not made nor the Head Tax paid; it is agreed, however, that the trip to St. Paul was made after correspondence with the immigration au-
22 thorities and at the direction of said authorities to present himself for the purpose named at said place.

It is further agreed that the Certificate marked Exhibit "B" of date December 14, 1912, issued by the acting United States Commissioner of Immigration, at Montreal, Canada, may be considered by the court for what it may be worth.

F. A. O'CONNOR,
United States Attorney and attorney for plaintiff.

KENYON, KELLEHER & O'CONNOR,
Attorneys for defendant.

This Bill of Exceptions signed by me this 27th day of January 1915.

F. A. O'CONNOR,
Attorney for plaintiff.

The foregoing bill of exceptions has been presented to us and we hereby agree that it correctly and fully sets forth the record in said case.

Signed this 28th day of January 1915.

KENYON, KELLEHER & O'CONNOR,
Attorneys for defendant.

Certificate of the Judge to Bill of Exceptions.

And to the end that all of the foregoing may be made of record in this cause, the plaintiff presents its Bill of Exceptions and asks that it be delivered, allowed and signed and made of record as such,—it is accordingly done this 8th day of February 1915; said Bill of Exceptions contains all of the proceedings had upon the trial of said cause, together with all of the evidence therein submitted and motions made, and all objections made, and ruling and all exceptions taken, and in all and every respect a full record of all proceedings had therein.

HENRY T. REED,
United States District Judge.

Filed in the District Court February 10, 1915.

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23 Citation on Appeal.

To Iver Engebretsen Ness and Kenyon, Kelleher and O'Connor, his Attorneys—Greetings:

You are hereby cited and admonished to appear at the Circuit Court of Appeals of the United States, for the Eighth Circuit to be held in the city of St. Louis, in the state of Missouri, on or before sixty days from the day this citation bears date, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States of the Northern District of Iowa, for a final judgment and decree signed, filed, and entered on the 16th day of October, 1914, in that certain suit being in equity No. 1 wherein the United States of America is plaintiff and you are defendant and appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in said order allowing appeal mentioned, should not be cor-

rected, and why justice should not be done to the parties in that behalf.

Witness the Honorable Henry T. Reed, United States District Judge for the Northern District of Iowa, this 22d day of January, 1915 and of the Independence of the United States the 139th.

Seal
U. S. Dist. Court
Northern Dist. of
Iowa.

HENRY T. REED,
United States District Judge for the Northern District of Iowa.

Service of the foregoing Citation accepted this 27th day of January, 1915, at Ft. Dodge, Iowa.

KENYON, KELLEHER & O'CONNOR,
Attorneys for Defendant Iver Ingebretsen Ness.

Filed February 9, 1915. Lee McNeely, Clerk.

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24 (Clerk's Certificate to Transcript.)

I, Lee McNeely, Clerk of the District Court of the United States in and for the Northern District of Iowa do hereby certify that the foregoing transcript contains a full, true and complete copy of the record and proceedings (so much thereof as is set forth in the Precipe for Transcript filed by Attorney for the Plaintiff herein) in the case of United States of America, Plaintiff vs. Iver Engebritsen Ness, Defendant,—No. 1 Equity, Central Division,—as full, true and complete as the originals of same now remain on file and of record in my office.

I further certify that the Original Citation with the return of service endorsed thereon, is hereto attached and returned herewith.

In Testimony whereof, I hereunto subscribe my name and affix the seal of said court at my office in said Northern District of Iowa this 11th day of February 1915.

Seal
U. S. Dist. Court
Northern Dist. of
Iowa.

LEE McNEELY,
Clerk United States District Court,
Northern District of Iowa.

Filed Feb. 15, 1915. John D. Jordan, Clerk.

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20 And thereafter the following proceedings were had in the Circuit Court of Appeals in said cause, viz:

(Appearance of Mr. F. A. O'Connor and Mr. Grover M. Neese, as counsel for appellant.)

United States Circuit Court of Appeals, Eighth Circuit.

UNITED STATES OF AMERICA, APPELLANT,
vs.
IVER ENGEBRETSEN NESS.
} No. 4408.

The clerk will enter my appearance as counsel for the appellant.

F. A. O'CONNER,
U. S. Attorney, North. Dist. Iowa.
GROVER M. NEESE,
Asst. U. S. Atty.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Feb. 19, 1915.

(Appearance of counsel for appellee.)

The clerk will enter my appearance as counsel for the appellee.

D. M. KELLEHER,
Ft. Dodge, Ia.
MAURICE O'CONNOR,
Ft. Dodge, Ia.
B. J. PRICE,
Ft. Dodge, Ia.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 17, 1915.

(Appearance of Mr. M. R. Bevington, as counsel for appellant.)

The clerk will enter my appearance as counsel for the appellant.

M. R. BEVINGTON,
221 Customs House, St. Louis, Mo.

21 (Endorsed): Filed in U. S. Circuit Court of Appeals, Mar. 18, 1915.

(Order of submission.)

December term, 1915.

Monday, December 13, 1915.

This cause having been passed and reset for this day, and being now called for hearing, the cause as to appellee is submitted on the brief, and, thereupon, the same was argued by Mr. M. R. Bevington

in behalf of appellant and submitted to the court on the transcript of the record from said district court and the briefs of counsel filed for the respective parties herein.

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22 (Opinion.)

United States Circuit Court of Appeals, Eighth Circuit.

No. 4408, December term, A. D. 1915.

UNITED STATES OF AMERICA, APPELLANT, *vs.* IVER ENGEBRETSEN NESS, APPELLEE.	Appeal from the District Court of the United States for the Northern District of Iowa.

Mr. M. R. Bevington (Mr. F. A. O'Connor, United States attorney, was with him on the brief), for appellant.

Mr. D. M. Kelleher and Mr. B. J. Price appeared on the brief for appellee.

Before SANBORN and CARLAND, Circuit Judges.

SANBORN, Circuit Judge, delivered the opinion of the court:

Is a certificate of citizenship issued by a court after notice, evidence and hearing, to an alien proved to be entitled in every other respect to reecive it, "illegally procured" because he failed to attach to his petition for naturalization a certificate from the Department of Commerce and Labor, stating the date, place, and manner of his arrival in the United States? This is the only question it is necessary to decide in order to dispose of this case, although many others are discussed in the briefs of counsel. The question arises in this way: Section 4 of the act of June 29, 1906, 34 Stat., 596, 597, U. S. Comp. Stat. Supp. 1911, page 529, provides than an alien may be admitted to become a citizen of the United States in the following manner, and not otherwise, and then prescribes many things that he shall do, among them, that he shall file a petition in writing signed by him in his own handwriting and duly verified, in which petition he shall

23 state his full name, his place of residence, his occupation, if possible, the date and place of his birth, the place from which he emigrated, the date and place of his arrival in the United States, and if he entered through a port, the name of the vessel on which he arrived, and more than a dozen other facts, and that at the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor "stating the date, place, and manner of his arrival in the United States, * * * which certificate shall be attached to and made a part of said petition." Section 15 of the same act imposes upon the United States attorney for the district in which the naturalized

citizen resides the duty, upon good cause shown, to institute proceedings to set aside and cancel any certificate of citizenship obtained by him "on the ground of fraud or on the ground that such certificate of citizenship was illegally procured." Under this section the United States brought this suit in equity and alleged in its complaint that on May 21, 1912, the District Court of Palo Alto County, Iowa, rendered a decree admitting Ness to citizenship and issued to him a certificate of his admission, that the certificate was procured by fraud, and that it was illegally procured in that the certificate of arrival by the Department of Commerce and Labor was not attached to the petition. In his answer to the complaint Ness denied the alleged fraud, admitted that the certificate of arrival was not filed with or attached to the petition, and alleged that the United States appeared and litigated the issue of the sufficiency of his petition and his right to admission to citizenship notwithstanding his failure to attach the certificate of entry, and the court of Palo Alto County, after a hearing, adjudged both questions in his favor. At the hearing in the court below the parties agreed that prior to the hearing on the petition for the naturalization of Ness in the District Court of Palo Alto County, M. R. Bevington, chief naturalization examiner of the Department of Commerce and Labor, for and on behalf of that department, and at its direction, filed a motion in which he stated that the petition should not be granted, because it was not supported by a certificate of arrival and cited authorities which he contended supported his position and requested a dismissal of the petition; that the Iowa court considered that motion and the authorities quoted at the time the petition came on for hearing and overruled it; that at that hearing Ness testified that he emigrated from Norway, arriving at Newcastle in Canada about June 11, 1906; that he did not know that the laws of the United States required him to submit to a medical examination, pay an alien head tax, or be registered
24 on entering this country; that he took passage on the Grand Trunk Railway, arrived in Buffalo, where he first entered the United States on August 21, 1906, remained on the train, passed through Buffalo into Canada, and again entered the United States through some port in Michigan; that he saw no person who was or purported to be an emigration commissioner until after he filed his petition for naturalization in March, 1912; that before it was heard he was advised that it was invalid, because it had no certificate of arrival attached, and he made an effort to procure such a certificate and was advised that it could not be furnished to him for the reason that there was no record of his entry into the United States. No evidence was presented at the hearing below of any fraud, misrepresentation, or deceit in the course of the proceedings in the Iowa court. There was no evidence that the proof before that court was not competent and ample to warrant its judgment, unless the absence from the petition of the certificate of arrival was fatal to that judgment, and the court below held, as did the Iowa court, that it was

not so, and rendered a decree of dismissal of the complaint of the United States.

Counsel for the United States contend that the decision of the court below was erroneous and should be reversed (1) because the absence of the certificate of arrival deprived the district court of Iowa of all jurisdiction of the suit of Ness for admission to citizenship, and (2) because the absence of this certificate of arrival caused the certificate of citizenship to be "illegally procured." The test of jurisdiction is not right decision but the right to enter upon the inquiry and make some decision. The Iowa court had complete jurisdiction of the person of Ness when he filed his petition. Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question, and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action or ground for relief, but it includes every issue within the scope of the general power vested in the court by the law of its organization to deal with the abstract question. It is not limited to making correct decisions. It empowers the court to determine every issue of law and of fact within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong. Foltz v. St. Louis & S. F. Ry. Co., 60 Fed., 316, 318; Insley v. United States, 14 Sup. Ct. Rep., 158; Cornett v. Williams, 20 Wall., 25 226; Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S., 552; In re Sawyer, 124 U. S., 200, 221; Skillerns v. May's Ex'rs, 6 Cranch, 267; McCormick v. Sullivant, 10 Wheat., 192; Hunt v. Hunt, 72 N. Y., 217; Colton v. Beardsley, 38 Barb., 30, 52; Otis v. The Rio Grande, 1 Woods, 279, Fed. cases No. 10613; Hamilton v. Railroad Co., 1 Md. Ch., 107; Evans v. Haefner, 29 Mo., 141, 147; State v. Weatherby, 45 Mo., 17; Rosenheim v. Hartsock, 90 Mo., 357, 365, 2 S. W., 473; State v. Southern Ry. Co., 100 Mo., 59, 13 S. W., 398; Hope v. Blair, 105 Mo., 85, 93, 16 S. W., 595; Musick v. Railway Co., 114 Mo., 309, 315, 21 S. W., 491; King v. McAndrews, 111 Fed., 860, 863, 864. The Iowa court was a court of general jurisdiction vested with plenary judicial power to determine all the issues in the proceedings of which it was given jurisdiction, including the questions relating to the lawfulness, sufficiency, form, and propriety of pleadings and procedure in such proceeding. Constitution of Iowa, art. 5, sec. 6, Code of Iowa, 1897, page 96, sec. 3600. Upon this court of general jurisdiction the Congress of the United States, by section 3 of the act of June 29, 1906, conferred full judicial power "to naturalize aliens as citizens of the United States," not on condition that the certificate of the Department of Commerce and Labor of his arrival should be filed with and attached to the petition of the alien, but generally and without any such narrow and technical condition. When, therefore, the applicant, Ness, filed his petition in that court to be admitted as a citizen of the United States the judicial power was conferred, and the duty was imposed upon the Iowa

court to hear and decide not only whether or not his petition and his procedure were sufficient, not only whether or not the absence of the certificate of entry was excused by the proved fact that none was ever issued, because he did not know one was required when he entered and the Department of Commerce and Labor had no knowledge when he entered, but also whether or not such an absence was fatal to his right to be admitted as a citizen, and also every other question as to his petition and procedure and as to his qualifications for admission which it was necessary for that court to decide in order to determine the ultimate question whether or not he was entitled under the acts of Congress to be admitted as a citizen.

An insufficient complaint at law or a defective petition in bankruptcy, accompanied by proper service of process on the defendants, gives jurisdiction to the court to determine the questions involved in the suit, although it may not contain averments which entitle
26 the complainant to any relief, or may not be accompanied by some copy or certificate required by a statute or rule of court. Facts indispensable to a favorable adjudication or decree include all those requisite to state a good cause of action, and they comprehend many that are not essential to jurisdiction of the suit or proceeding. The only facts which condition the jurisdiction of the Iowa court to hear and determine the questions relative to the admission of Ness to citizenship were his preparation and filing of his petition in that court asking its issue of a certificate of citizenship to him, and this is equally true although there was some technical or amendable defect in his petition or procedure, as long as the petition stated substantial cause for his admission to citizenship. In re Plymouth Cordage Co., 135 Fed. 1000, 1004, 68 C. C. A. 434, 438; In re First National Bank, 152 Fed. 64, 69, 81 C. C. A. 260, 265.

The result is that the absence of the certificate of entry did not condition the jurisdiction of the Iowa court to hear and determine every material issue presented by Ness on his petition to be admitted as a citizen. The provision of the act of Congress requiring the certificate to be filed and made a part of the petition is like the requirements of the statutes of Iowa that every party on filing any petition shall file with it one plain copy thereof for the use of the adverse party, Code of Iowa, 1897, sec. 3558; that every petition must contain after the names of the parties the words "petition at law" or "petition in equity," and that each division of the petition in equity shall be separated into paragraphs numbered as such. Section 3559. Such requirements are not jurisdictional but relate merely to the form of pleadings and proceedings.

We turn to the second question. Was Ness' certificate of citizenship "illegally procured" within the meaning of section 15 of the act of June 29, 1906, because his petition was not accompanied with a certificate from the Department of Commerce and Labor, stating the date, place, and manner of his arrival in the United States? This is a suit in equity to cancel this certificate on the ground that this question should be answered in the affirmative, and this suit

must be considered and decided in accordance with the rules and principles of equity jurisprudence applicable to cases of this nature. Luria v. United States, 231 U. S. 9, 28. Section 15, says the Supreme Court, "makes no discrimination between the rights of naturalized and native citizens, and does not in any wise affect or disturb right acquired through lawful naturalization, but
27 only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make an act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship to which their possessors never were lawfully entitled." 231 U. S. 24. The court below and the Iowa court considered the question here at issue under the evidence produced and reached the conclusion that this certificate of naturalization was not illegally procured, and the decision of the chancellor below must be presumed to be correct and may not be lawfully disturbed or reversed unless it clearly appears that some obvious error of law has intervened or some serious mistake of fact has been made. Tilghman v. Proctor, 125 U. S. 136; Kimberly v. Arms, 129 U. S. 512; Coder v. Arts, 152 Fed. 943, 946, 82 C. C. A. 91, 94, and cases there cited.

"A court of equity can act only on the conscience of a party. If he has done nothing that taints it, no demand can attach upon it so as to give any jurisdiction." Boone v. Chiles, 10 Pet. 177, 210; Illinois Trust & Sav. Bank v. City of Arkansas City, 22 C. C. A. 171, 193, 76 Fed. 271, 293; United States v. Winona & St. Peter R. Co., 15 C. C. A. 96, 108, 67 Fed. 948, 960; United States v. Northern Pacific R. Co., 95 Fed. 864, 880, 37 C. C. A. 290, 306. Ness entered this country without any notice or knowledge that the certificate of entry was required and as the officers of the Department of Commerce and Labor did not know when he entered they could not give him a certificate on their own knowledge, and if one were given it must be on his statement, or on the statement or some other witness who knew. Ness possessed every essential qualification for admission to citizenhip. He had declared his intention to become a citizen and to renounce his allegiance and fidelity to any foreign sovereignty two years before he applied for admission to citizenship. He satisfied the court by the testimony of witnesses that he had resided in the United States five years; that during this time he had behaved as a man of good moral character attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same. He declared on oath at the time of his admission that he would support the Constitution of the United States and that he abjured all allegiance and fidelity to every foreign sovereignty. He proved all these facts in the Iowa court and in
28 the court below. He was frank and truthful, and he submitted to those courts on this evidence the question whether or not he could be legally admitted to citizenship, and they both decided that

he could be. There was certainly nothing in all this to taint the conscience of the applicant or to induce a court of equity to act to cancel his certificate.

Moreover, the filing of the certificate of entry was not, like the declaration of intention, the proof of moral character, the renunciation of allegiance, the residence of five years, an essential qualification of admission to citizenship. It was but a matter of mere form of procedure. He alleged in his petition for admission, and proved before the Iowa court, every fact required to be stated in the certificate of entry. He pleaded and proved the date, place, and manner of his arrival in the United States. The certificate of entry, therefore, could have neither added to nor detracted from the right of the applicant to admission to citizenship. It never could have been the intention of Congress to deprive an applicant who had all the essential qualifications for admission to citizenship of that privilege by a mere failure to comply with such a requirement of mere form of the petition or precedure. Even if the Iowa court had made a mistake in failing to require the certificate as a condition of its decree, that mistake would have been a mere irregularity, not an illegality; it would have been a mere mistake in the exercise of its lawful discretion as to the form of the petition and the procedure. There is a wide difference between a mistaken disregard of a provision, with reference to the form of pleadings, or the manner of procedure, which are always largely in the discretion of the trial court, and a mistaken disregard of the requirement of an essential qualification of admission to citizenship, such as the declaration of intention, the residence in the United States for five years, the renunciation of allegiance to any foreign sovereignty. The former is a mere irregularity; the latter an illegality. Illegality signifies that which is contrary to the established principles of the law. There was nothing contrary to the established principles of the law in the issue of his certificate of citizenship, to an applicant who had every essential qualification of citizenship, although the certificate of entry which was material only to the date, place, and manner of his arrival, all of which were truthfully pleaded and conclusively proved otherwise, was not attached to his petition. On the other hand, to have denied his petition on that ground would have
29 been a travesty of justice. The power was conferred and the duty was imposed on the Iowa court to adjudge whether or not this applicant should be admitted on the evidence before it which proved the date, place, and manner of the applicant's arrival, his possession of the essential qualifications to entitle him to admission as a citizen, and that the reason why he did not file a certificate of his entry was that he entered in ignorance of any requirement of his registry, and that the officers of the Department of Commerce and Labor did not know when he entered, had no record of it, and could not on their own knowledge give the certificate. That court decided that he was entitled to admission, although he had not filed or attached to his petition a certificate of entry. In our opinion that

opinion was just and right, and the certificate of citizenship to Nes was not illegally procured. Similar conclusions have been reached in some of the district courts. United States v. Stoller, 180 Fed. 910 912; In re Schmidt, 207 Fed. 678, 681; In re McPhee, 209 Fed. 143 In re Pick, 209 Fed. 999.

The decree which dismissed the complaint of the United States i Affirmed.

Filed February 16, 1916.

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30 (Decree.)

United States Circuit Court of Appeals, Eighth Circuit. Decembe Term, 1915.

WEDNESDAY, FEBRUARY 16, 1916.

UNITED STATES OF AMERICA, APPELLANT,
vs.
IVER ENGREBRETSEN NESS. } No. 4408.

Appeal from the District Court of the United States for th Northern District of Iowa.

This cause came on to be heard on the transcript of the record fro the District Court of the United States for the Northern District o Iowa, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, an decreed by this court that the decree of the said district court in thi cause be, and the same is hereby, affirmed without costs to eithe party in this court.

FEBRUARY 16, 1916.

31 (Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States Circuit Court o Appeals for the Eighth Circuit, do hereby certify that the foregoin contains the transcript of the record from the District Court o the United States for the Northern District of Iowa, as prepare and printed under the rules of the United States Circuit Court o Appeals for the Eighth Circuit, under the supervision of its clerk and full, true, and complete copies of all the pleadings, recor entries, and proceedings, including the opinion, had and filed in th United States Circuit Court of Appeals, except the full caption titles, and endorsements omitted in pursuance of the rules of th Supreme Court of the United States in a certain cause in sai Circuit Court of Appeals wherein the United States of America

appellant and Iver Engebretsen Ness is appellee, No. 4408, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twenty-eighth day of April, A. D. 1916, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the judges of the District Court of the United States for the Northern District of Iowa.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this twenty-first day of September, A. D. 1916.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

32 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United State Circuit Court of Appeals for the Eighth Circuit, greeting:

Being informed that there is now pending before you a suit in which the United States of America is appellant and Iver Engebretsen Ness is appellee, No. 4408, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of Iowa, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme
33 Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Edward D. White, Chief Justice of the United States, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

34 In the Supreme Court of the United States, October term, 1916.

THE UNITED STATES, PETITIONER,
vs.
IVER ENGEBRETSEN NESS. } No. 719.

Stipulation as to return to writ of certiorari.

It is hereby stipulated by counsel for the parties to the above-entitled cause that the certified copy of the transcript of the record

now on file in the Supreme Court of the United States shall constitute the return of the clerk of the United States Circuit Court of Appeals for the Eighth Circuit to the writ of certiorari granted therein.

JNO. W. DAVIS,
Solicitor General H.
DENIS M. KELLEHER,
B. J. PRICE,
Counsel for Respondent.

October 26, 1916.

(Endorsed:) No. 4408. United States of America, appellant, vs. Iver Engebretsen Ness. Stipulation as to return to writ of certiorari. Filed Nov. 13, 1916, John D. Jordan, clerk.

35 Return to writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ of certiorari and in pursuance of the stipulation of the parties, a full, true, and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of United States of America, appellant, vs. Iver Engebretsen Ness, No. 4408, is a full, true, and complete transcript of all the pleadings, proceedings, and record entries in said cause as mentioned in the certificate thereto.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the city of St. Louis, Missouri, this thirteenth day of November, A. D. 1916.

[SEAL.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 25549. Supreme Court U. S. October term, 1916. Term No. 719. The United States, petitioner, vs. Iver Ingebretsen Ness. Writ of certiorari and return. Filed November 16, 1916.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, PETITIONER,
v.
IVER INGEBRETSEN NESS.
No. 719.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION BY THE UNITED STATES TO PLACE ON THE SUMMARY DOCKET.

Comes now the Solicitor General and respectfully moves the court to place the above-entitled cause on the summary docket.

STATEMENT.

Ness filed in the District Court of Palo Alto County, Iowa, a petition for naturalization, but did not attach thereto a certificate of arrival in the United States, as required by section 4 of the Naturalization Act of June 29, 1906, 34 Stat. 596. The naturalization authorities by motion resisted the petition on this ground, but the motion was overruled and the certificate of citizenship granted. There was no other objection to the issuance of the certificate.

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Thereafter, under section 15 of the Naturalization Act, the present proceeding was begun by the United States in the District Court for the Northern District of Iowa to cancel the certificate for the reason that it had been "illegally procured" within the meaning of said section 15. The petition was dismissed (217 Fed. 169), and on appeal to the Circuit Court of Appeals for the Eighth Circuit the judgment was affirmed (230 Fed. 950). Both courts held that the failure to file a certificate of arrival with the petition for naturalization was at most merely an irregularity of procedure, and was not such an "illegality" as section 15 of the act contemplated. The lower court also held that a judgment granting naturalization could, like any other judgment, be impeached only for fraud or lack of jurisdiction, but the Circuit Court of Appeals does not seem to have passed on this point.

Thereafter, upon petition filed by the United States, this court, on October 23, 1916, granted a writ of certiorari to the judgment of the Circuit Court of Appeals.

In *United States* v. *Solomon Louis Ginsberg*, No. 401, this term, decided April 9, 1917, the court said:

> No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in section 15 and demand its cancellation unless issued in accordance with

such requirements. If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge can not supply these nor render their existence nonessential.

It is submitted that this decision substantially forecloses the present case and therefore it does not require extended argument. For these reasons the case should be placed on the summary docket.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

APRIL, 1917.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, Petitioner,
v.
IVER ENGEBRETSEN NESS. } No. —.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Supreme Court of the United States:

The Solicitor General, on behalf of the United States, prays for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit in the above-entitled cause.

QUESTION PRESENTED.

The Naturalization Act of June 29, 1906, 34 Stat. 596, provides, in part, as follows:

> SEC. 4. That an alien may be admitted to become a citizen of the United States *in the following manner and not otherwise*:
>
> * * * * *
>
> Second. Not less than two years nor more than seven years after he has made such dec-

laration of intention, he shall make and file, in duplicate, a petition in writing * * *.

The petition shall also be verified by the affidavits of at least two credible witnesses * * *.

At the time of filing his petition *there shall be filed with the clerk of the court a certificate from the Department of Labor*, if the petitioner arrives in the United States after the passage of this act, *stating the date, place, and manner of his arrival in the United States*, and the declaration of intention of such petitioner, *which certificate* and declaration *shall be attached to and made a part of said petition.*

SEC. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or *on the ground that such certificate of citizenship was illegally procured.* * * * [Italics mine.]

The question in the present case is, What is the meaning of the words "illegally procured" in section 15, *supra*, and specifically whether a certificate of citizenship granted upon a petition which did not have attached to and made a part of it a certificate of arrival as provided in section 4, *supra*, can be said to have been "illegally procured."

STATEMENT OF THE CASE.

On May 21, 1912, Ness filed a petition for naturalization in the District Court of Palo Alto County, Iowa, but no certificate of arrival was attached to it (R. 15). The naturalization authorities by motion resisted it on this ground (*ib.*), but the motion was overruled and the certificate of citizenship granted (R. 16). There was no other objection to the issuance of the certificate. On October 28, 1912, the present proceeding was begun by the United States in the District Court for the Northern District of Iowa to cancel the certificate for the reason that it had been "illegally procured," within the meaning of section 15, *supra* (R. 1–3). The petition was dismissed (R. 11; 217 Fed. 169), and on appeal this judgment was affirmed (R. 21, 26; 230 Fed. 950). Both courts held that the failure to file with the petition a certificate of arrival was at most merely an irregularity of procedure, and was not such an "illegality" as section 15 of the act contemplated. The lower court also held that a judgment granting naturalization could, like any other judgment, be impeached only for fraud or lack of jurisdiction (R. 11), but the Circuit Court of Appeals does not seem to have passed on this point.

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. The decision is contrary to that of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Mulvey*, 232 Fed. 513.

It is contrary, either directly or in effect, to the decisions of other naturalization courts in other parts

of the United States, said decisions being specifically referred to in the brief in support of this petition.

Since the only power conferred on Congress in this regard by the Constitution is "to establish an *uniform* Rule of Naturalization" it is most important that the decisions of the courts construing the act shall be uniform, and it is proper to petition this court to exercise its general supervisory power so as to establish this uniformity of decisions.

2. The Circuit Court of Appeals in this cause virtually set up its own ideas of what is just and necessary in naturalization proceedings over those of Congress. The latter has explicitly provided that a certificate of arrival *shall* be filed with the petition, just as it has provided that the petition shall be filed, shall be verified, and shall be supported by certain proofs. It is not for the courts, on account of the supposed hardship of a particular case, to declare that some of these requirements are essential and required by law, while others are not. It is for Congress to make this distinction, if it desire to do so.

BRIEF IN SUPPORT OF THE PETITION.

I.

In the present case, the *ratio decidendi* of the opinion below is contained in the following quotation (R. —):

> * * * Even if the Iowa court had made a mistake in failing to require the certificate as a condition of its decree, that mistake would have been a mere irregularity, not an illegality;

it would have been a mere mistake in the exercise of its lawful discretion as to the form of the petition and the procedure. There is a wide difference between a mistaken disregard of a provision with reference to form of pleadings, or the manner of procedure, which are always largely in the discretion of the trial court, and a mistaken disregard of the requirement of an essential qualification of admission to citizenship, such as the declaration of intention, the residence in the United States for five years, the renunciation of allegiance to any foreign sovereignty. The former is a mere irregularity; the latter an illegality. Illegality signifies that which is contrary to the established principles of the law. There was nothing contrary to the established principles of the law in the issue of his certificate of citizenship to an applicant who had every essential qualification of citizenship, although the certificate of entry which was material only to the date, place, and manner of his arrival, all of which were truthfully pleaded and conclusively proved otherwise, was not attached to his petition. * * *

In *United States* v. *Mulvey, supra*, the Circuit Court of Appeals for the Second Circuit, speaking in ard to the same subject, said (p. 519):

> Section 15 of the act authorizes the district attorney to proceed by petition to set aside the certificate "on the ground of fraud or on the ground that such certificate was illegally procured." It is conceded that no fraud was practiced on the court. And it is said that

> while the certificate in this case may have been erroneously granted it was not illegally procured and that therefore the right to proceed by petition does not exist. We do not agree to that view of the statute. The word "illegal" means contrary to law and therefore we think that the word as employed in this particular statute may be construed to mean that whenever an alien has obtained a certificate of citizenship which is unauthorized by the Naturalization Act he has procured it "illegally" or contrary to law. * * *

The court then proceeds to state that in naturalization proceedings the Government is not ordinarily represented by its law officers, that no such record is kept of the proceedings as in ordinary litigated cases in a court of record, and that it has been decided by the upper courts that there is no right of appeal from the decision of a court in a petition for naturalization. The court concludes as follows (p. 519).

> * * * There was reason enough, therefore, for the enactment of the provision authorizing the district attorney to proceed by petition in this class of cases, and we are not inclined to give to its language a meaning which would unnecessarily, and so far as we can see without good reason, narrow the object intended to be accomplished.

It is true that the *Mulvey* case was one involving the question whether the applicant had lived continuously in the United States for five years, and that the Circuit Court of Appeals in the present case expressly mentions that this is a fundamental ques-

tion, and not a mere irregularity. Nevertheless, it is evident that the Circuit Court of Appeals for the Second Circuit in the *Mulvey* case did not see any distinction between this particular provision of the naturalization law and other mandatory provisions, and felt that it was necessary to give a broad meaning to the words "illegally procured," because otherwise there would not be any power in the lower court to revise a decision of a coordinate Federal court granting naturalization where the whole matter was disclosed. This is clear from the dissenting opinion of Judge Hough, wherein he bases his dissent upon the very same reasoning used by the Circuit Court of Appeals in the present cause. He said (232 Fed. 520, 521):

> * * * There is a plain difference between illegality and irregularity or error. "Illegality" signifies "that which is contrary to the principles of law and denotes a complete defect in the proceedings." *People* v. *Kelley*, 1 Abb. Prac. N. S. (N. Y.) 437. "Irregularity is want of adherence to some prescribed rule * * *. Illegality is predicable of radical defects only and signifies that which is contrary to the principles of law as distinguishable from mere rules of procedure." *Ex parte Mooney*, 26 W. Va. 40.
>
> * * * It [the certificate of naturalization] may have been erroneously granted, but the grant was not illegal, for such is not the effect of error in the exercise of lawful jurisdiction. "A judgment cannot be unlawful unless that judgment be an absolute nullity;

> and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous." Per Marshall, C. J., *Ex parte Watkins*, 3 Pet. at 203.

This dissenting opinion of Judge Hough shows clearly the basis of the controversy between the majority of the court and himself, and that he was in agreement with the views of the Circuit Court of Appeals for the Eighth Circuit in the present case, while the majority of the court was against those views. He has the same view as to the conclusiveness of a judgment in a naturalization proceeding which the Circuit Court of Appeals in the present case had, namely, that it is entitled to as much respect as the judgment of a court of record in an ordinary adversary proceeding, at law or in equity, and can only be set aside for the same reasons. The Circuit Court of Appeals in the present case said (R. 22):

> * * * The Iowa court had complete jurisdiction of the person of Ness when he filed his petition. Jurisdiction of the subject matter is the power to deal with the general abstract question, to hear the particular facts in any case relating to this question and to determine whether or not they are sufficient to invoke the exercise of that power. It is not confined to cases in which the particular facts constitute a good cause of action or ground for relief, but it includes every issue within the scope of the general power vested in the court by the law of its organization to deal with the

> abstract question. It is not limited to making correct decisions. It empowers the court to determine every issue of law and of fact within the scope of its authority according to its own view of the law and the evidence, whether its decision is right or wrong. * * * (Citing numerous authorities.)

It is not necessary now to argue that this view of the nature of a judgment in a naturalization proceeding, adopted by the Circuit Court of Appeals in the present case, and by Judge Hough in the *Mulvey* case, is contrary to the decision of this court in *Johannessen* v. *United States*, 225 U. S. 227, 241. The point is that the decision of the Circuit Court of Appeals for the Second Circuit in the *Mulvey* case is directly contrary on principle to the decision of the Circuit Court of Appeals for the Eighth Circuit in the present case, in that one gave an interpretation to the words "illegally procured," which would have been repudiated by the other.

It is submitted that this alone is a sufficient ground for the exercise by this court of its supervisory power by way of certiorari.

II.

The question whether a certificate of arrival must be filed with the petition for naturalization has arisen, so far as we are aware, in only two reported cases. In *In re Liberman* in the District Court for the Western District of Washington, 193 Fed. 301, Judge Hanford held that this certificate was jurisdictional,

and that no petition could be granted without it. He said (p. 302):

> * * * The authority of courts to admit aliens to citizenship is conferred and limited by laws enacted by Congress, and all the provisions of law prescribing the procedure in the exercise of the authority are mandatory. * * * It is essential to the validity of a petition that it must be full and complete in the statement of facts which the law requires. It must be verified as the law prescribes, and there must be filed with it the applicant's preliminary declaration of intention; and if his immigration into the United States shall have been subsequent to June 29, 1906, there must also be filed a certificate from the Department of Commerce and Labor required by that part of the law above quoted.

In *in re Kolbel*, decided by the Supreme Court of New York in special term, 146 N. Y. Supp. 885, the same ruling was made, relying upon the *Liberman* case, and the case of *United States* v. *Spohrer*, 175 Fed. 440 (referred to with approval by this court in the *Johannessen* case, 225 U. S. 227, 240). The court said (p. 886):

> * * * The law is plain in its terms that the certificate shall be filed "at the time of filing his petition." To hold otherwise, and allow him to file his petition on one day and the certificate of arrival on some subsequent day, would be one step in the direction of frittering away the provisions of a very wholesome and useful law.
>
> * * * * *

> The fact that the applicant's declaration was about to expire by reason of the seven-year limitation at the time he filed his petition is insufficient to move the court to disregard the conditions with respect to the certificate of arrival which Congress has taken the pains to stipulate. Aliens are on notice as to the requirements of the naturalization law, and if they neglect to take the necessary steps toward citizenship, including the procuring of a certificate of arrival, until the last minute, when it is too late, they must bear the consequences.

These are the only reported decisions upon the question of the importance of the certificate of arrival, except the present case, although we are informed that other unreported decisions have been made by naturalization courts to the same effect as the *Liberman* decision.

III.

The Naturalization Act contains a number of provisions, mandatory in form, and requiring certain things to be done by an alien before his petition can be granted. The question as to the power of the lower Federal courts, acting under section 15 of the act, to annul the action of a State court, or of a co-ordinate Federal court, for mere illegality, has frequently arisen, and the power to do so has been sustained, with but very few exceptions. A reference to the cases, which is not by any means complete, follows:

In *United States* v. *Schurr et al.*, 163 Fed. 648, the certificate was cancelled because the State court had

issued it to an alien resident in an adjoining county. In *United States* v. *Van Der Molen*, 163 Fed. 650, the certificate was cancelled because granted by the State court upon a petition filed less than two years after the declaration of intention. In *United States* v. *Nisbet*, 168 Fed. 1005, the petition granted by the State court was cancelled because the witnesses as to the length of residence of the alien had not been examined on oath in the presence of the court. Judge Hanford said (p. 1006):

> * * * The manifest intention of Congress in the enactment of the naturalization law of 1906, was to prescribe rigid rules to be observed by the courts in naturalization proceedings and to correct the abuse of laxity in such proceedings. Therefore a court may not, in the exercise of assumed discretionary power, admit an alien to citizenship who has failed to establish his right by the kind of evidence which the statute demands.

In *United States* v. *Simon*, 170 Fed. 680, Judge Lowell cancelled a naturalization certificate granted by the State court, on the ground that the applicant has not lived continuously in the United States for the requisite period. He said (p. 682):

> * * * If, however, the State court was not imposed on, but acted with full knowledge of the facts, it must have found as a fact that Simon's residence in the United States for five years preceding his naturalization of April 20, 1901, was substantially unbroken. Therefore it must have ruled as matter of law

> that the British naturalization, which was obtained upon his application within these five years, did not interrupt the running of the statutory period of his residence in the United States. If the State court proceeded upon this ground, I must hold that it erred in matter of law, and so that Simon's naturalization was "illegally procured."

In *United States* v. *Cohen*, 179 Fed. 834, the Circuit Court of Appeals for the Second Circuit ordered, on appeal—a procedure somewhat peculiar to this circuit—the cancellation of a certificate on the ground that an alien wife of an alien husband could not become a naturalized citizen of the United States.

In *United States* v. *Plaistow*, 189 Fed. 1006, a State certificate was cancelled on the ground that the alien had not served out a full term of enlistment in the Marine Corps, and, therefore, did not come within the peculiar exemption contained in the act of July 26, 1894, 28 Stat. 123, 124. Judge Hazel referred to the *Anderson* case, 169 Fed. 201, which is often cited as against the power of the Government to cancel certificates of naturalization for mere error in the proceedings in the naturalizing court, declared that it was contrary to the weight of authority, and said (p. 1010):

> * * * But Congress clearly intended to provide procedure for nullifying certificates fraudulently obtained, and for correcting misinterpretations or misapplications of the acts of the courts. The term "illegally pro-

cured" is not limited to irregularity of procedure, but also denotes the determination by the court contrary to law of the matter submitted to it.

He refers to the case of *Tiedt* v. *Carstensen et al.*, 61 Iowa, 334, where Judge Beck, speaking for the court, used the following language (p. 335):

> We are, therefore, only to inquire, when is a tribunal "acting illegally" in the contemplation of the statute? When the law prescribes proceedings to be had by an officer or tribunal in cases pending before them, the omission of such proceedings is in violation of law, and the court or officer omitting them would, therefore, act illegally. In a word, if a tribunal, when determining matters before it which are within its jurisdiction, proceeds in a manner contrary to law, it acts illegally. But if a discretion is conferred upon the inferior tribunal, its exercise can not be illegal.

In *United States* v. *Kolodner*, 204 Fed. 240, the Court of Appeals for the Third Circuit cancelled an order of naturalization because the petitioner had proved his five-year residence by depositions instead of by oral testimony in court. Judge Gray, delivering the opinion of the court, said (p. 244):

> This conclusion may be, and doubtless is, a hardship imposed upon the applicant in this case. We may not, however, in order to avoid the hardship of a particular case, relax the strict requirements imposed by the lawmaking power upon those who seek to obtain the privilege of citizenship in the United States,

> or impair in any degree, by judicial interpretation, the safeguards sought to be thrown around the citizenship of the country.

In *United States* v. *Cantini*, 212 Fed. 925, the Court of Appeals for the Third Circuit ordered the cancellation of a certificate because, on very difficult facts, it thought that the petitioner had not resided continuously for five years in the United States.

In *United States* v. *Nopoulos*, 225 Fed. 656, Judge Wade, in the Southern District of Iowa, cancelled a certificate on the ground that the petitioner did not come within a special class designated by the act of June 25, 1910, 36 Stat. 829, 830, who could become citizens without declarations of intention. In this case no declaration of intention was filed with the petition, and as the filing of the declaration of intention can hardly be distinguished in the language of the act from the filing of the certificate of arrival, the case seems a direct authority against the decision of the court below. All of the authorities are collected in the opinion, and the court said (p. 659):

> That it is the duty of this court to review an error of law by the lower court is clearly established by a number of cases.

In *United States* v. *Leles*, 227 Fed. 189, 192, the court said:

> It is further urged that the complaint discloses upon its face that the matters counted upon as the basis of the alleged invalidity of the defendant's certificate of naturalization are in the nature merely of irregularities in the

> proceedings of the court, which may only be corrected on appeal, and, further, that the order of the court granting naturalization is in the nature of a final judgment, which likewise may be attacked only by direct appeal therefrom, and is not open to collateral attack. But these contentions are fully met and negatived by the principles announced in *Johannessen* v. *U. S.*, 225 U. S. 227, 238 * * *.

These decisions, it is submitted, clearly show that the opinion of the Circuit Court of Appeals in the present case is contrary, both directly and on principle, to the decision of many other United States courts construing the Naturalization Act of June 29, 1906. It is true that only two of the decisions referred to above directly deal with the certificate of arrival; but all of them, it is believed, gave a construction to the words "illegally procured" contrary to and broader than the construction given to them by the court below in this case. Whether or not there be a distinction between the filing of the certificate of arrival, on the one side, and the character of the alien, the nature of the proof presented by him, the manner in which the petition must be executed and signed, and verified, the nature of his five-year residence, and questions of that character on the other, it is evident that the decision of the court below raises a doubt in the minds of all persons interested as to which particular provisions of the act are required by law, in the sense that the certificate may be cancelled if they are not complied with, and which

are not, and also a doubt as to what principle the court below meant to lay down to determine which provisions of the act are of this character and which are not. It is true that the court below excluded from the scope of its opinion the essential qualifications of admission to citizenship, such as the declaration of intention, the residence in the United States for five years, the renunciation of allegiance to any foreign sovereign. Yet this ruling is merely empirical, it gives no test by which it can be determined whether five years residence is essential or not, and leaves the matter to be determined, in effect, by the individual ideas of each particular judge as to the justice of the case before him.

Under these circumstances, it is submitted that this court should take jurisdiction of the case, and should lay down some general rule which will insure a uniform administration of the act in regard to the various specific requirements of the statute.

IV.

The decision of the court below, it is submitted, is really contrary to the decision of this court in the *Johannessen* case, *supra*. There, at page 241, this court said of section 15 of the Naturalization Act:

> * * * The act in effect provides for a new form of judicial review of a question that is in form, but not in substance, concluded by the previous record, and under conditions affording to the party whose rights are brought into question full opportunity to be heard.

These views are repeated in the *Luria* case, 231 U. S. 9, 24.

It is true that the *Johannessen* case was a case of fraud, and that this court carefully refrained from passing upon the question of the effect of the judgment of naturalization "in a case where the Government has appeared and litigated the matter." Without urging the point that in the present case the Government did not appear and litigate the matter in the sense meant by this court, but only appeared in the light of an *amicus curiæ* to call the court's attention to a supposed defect in the proceedings (R. 16), the whole tenor of the opinion of this court in the *Johannessen* case is that the proceeding under section 15 for a cancellation of the certificate is, in effect, merely a review, by way of error or appeal, of the proceedings on the original petition for naturalization. Two Circuit Courts of Appeal have held that there is no right of direct appeal in a naturalization proceeding (*U. S.* v. *Dolla*, 177 Fed. 101, *U. S.* v. *Neugebauer*, 221 Fed. 938), and the same ruling has been made in the only State court which has passed upon the question (*State* v. *Court*, 75 Wash. 239). Whether these decisions be correct or not, it is evident that it would be practically impossible, as well as exceedingly undesirable, for the United States directly to challenge the decisions of every naturalization court in the United States in every naturalization case by way of a direct appeal. It is evidently much more satisfactory to proceed

by way of an independent action directly against the certificate holder to cancel his certificate. In this way the cases can be selected which deserve such treatment, and the facts can be fully developed and the case properly presented. This is what section 15 of the act intended, and this is what it accomplished according to the decision of this court in the *Johannessen* case. It follows, therefore, that on such a petition for cancellation any error of law committed by the court of original jurisdiction in granting the certificate may be revised and corrected, and it makes no difference whether that error consists in something which may be called fundamental and essential, or in something which may be called irregular. Upon such a proceeding or review, the only question is whether the court of original jurisdiction complied with the precise requirements of the Naturalization Act. If it did not, it committed error, and the certificate was "illegally procured," and the court is not concerned with the greater or less importance of the particular provisions in the act, nor with the merit or lack of merit of the particular case before it.

V.

The Circuit Court of Appeals below stated that similar conclusions had been reached in some of the district courts, and referred to *United States* v. *Stoller*, 180 Fed. 910, *In re Schmidt*, 207 Fed. 678, *In re McPhee*, 209 Fed. 143, and *In re Pick*, 209 Fed. 999. None of these cases is in point except that

of *Stoller*, where Judge Whitson, in the Eastern District of Washington, held that the provision requiring the petition to be filed in duplicate was directory merely, and if such a duplicate was not filed, the certificate nevertheless could not be attacked in proceedings for cancellation. In regard to this case, while it might possibly be distinguished from the present, the Government prefers to take the position that it is incorrect and that the court erred, as did the court in the present case, in attempting to distinguish between the mandatory provisions of the act, and to hold some merely directory, and others jurisdictional.

VI.

Some stress is laid by the court below upon the fact that Ness innocently entered the country in such a way as not to be able to procure a certificate of arrival, so that, unless the petition could be sustained without it, he never could be naturalized at all. Assuming this to be so, it is clear that the hardship of a particular case can not justify a court in departing from the specific provisions of an act of Congress. However, as a matter of fact, the Department of Labor grants what are known as *nunc pro tunc* certificates which have been sustained by the courts. *In re Schmidt, supra, In re McPhee, supra.* Ness could have procured one of these certificates if he had chosen, so that his naturalization could have been lawfully effected.

VII.

As has been stated above, some point was made in the lower court that the Government was represented at the hearing in the original naturalization proceedings, so that the judgment granting the certificate of naturalization became *res adjudicata* as to it. The Circuit Court of Appeals, however, did not rest its judgment upon this ground, and it does not seem necessary, therefore, to discuss it in the present status of this case. If it be deemed material, the court's attention is called to the fact that the same point is apparently raised in the case of *United States* v. *Ginsberg*, No. 401 on the docket of this court for the present term, upon certificate from the Circuit Court of Appeals for the Eighth Circuit; so that there is an additional reason arising from the pendency of that case in this court for the allowance of a certiorari in the present case.

It is submitted that the writ should issue as prayed.

JOHN W. DAVIS,
Solicitor General.

SEPTEMBER, 1916.

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In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE UNITED STATES, PETITIONER,
v.
IVER INGEBRETSEN NESS.
No. 284.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

The record in this case presents but one question, to wit, whether a certificate of citizenship granted upon a petition which did not have attached thereto and made a part of it a certificate of arrival in the United States as provided by section 4 of the Naturalization Act can be said to have been "illegally procured" within the meaning of section 15 of said act.

STATEMENT.

On May 21, 1912, Ness presented to the District Court of Palo Alto County, Iowa, a petition for naturalization, but did not attach thereto a certificate of arrival in the United States, as required by section 4 of the Naturalization Act of June 29, 1906, 34 Stat.

596, c. 3592 (R. 15). The naturalization authorities by motion resisted the petition on this ground (*ib.*), but the motion was overruled and the certificate of citizenship granted (R. 16). There was no other objection to the issuance of the certificate.

On October 28, 1912, under section 15 of the Naturalization Act, the present proceeding was begun by the United States in the District Court for the Northern District of Iowa to cancel the certificate for the reason that it had been "illegally procured" within the meaning of said section 15. The petition was dismissed (R. 11; 217 Fed. 169), and on appeal to the Circuit Court of Appeals for the Eighth Circuit the judgment was affirmed. (R. 21, 27; 230 Fed. 950.) Both courts held that the failure to file a certificate of arrival with the petition for naturalization was at most merely an irregularity of procedure, and was not such an "illegality" as section 15 of the act contemplated. The lower court also held that a judgment granting naturalization could, like any other judgment, be impeached only for fraud or lack of jurisdiction, but the Circuit Court of Appeals does not seem to have passed on this point.

Thereafter, upon petition filed by the United States, this court, on October 23, 1916, granted a writ of certiorari to the judgment of the Circuit Court of Appeals.

STATUTES INVOLVED.

The Naturalization Act of June 29, 1906, *supra*, provides, in part, as follows:

> SEC. 4. That an alien may be admitted to become a citizen of the United States *in the following manner and not otherwise:*
>
> * * * * *
>
> Second. Not less than two years nor more than seven years after he has made such declaration of intention, he shall make and file, in duplicate, a petition in writing. * * *
>
> The petition shall also be verified by the affidavits of at least two credible witnesses * * *.
>
> At the time of filing his petition *there shall be filed with the clerk of the court a certificate from the Department of Labor*, if the petitioner arrives in the United States after the passage of this act, *stating the date, place, and manner of his arrival in the United States*, and the declaration of intention of such petitioner, *which certificate* and declaration *shall be attached to and made a part of said petition.*
>
> SEC. 15. That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or *on the ground that such certificate of citizenship was illegally procured* * * * [Italics mine.]

ARGUMENT.

I.

The question presented is settled by the decision of this court in *United States* v. *Ginsberg*, 243 U. S. 472, 475, in which the court said:

> No alien has the slightest right to naturalization unless all statutory requirements are complied with; and every certificate of citizenship must be treated as granted upon condition that the Government may challenge it as provided in section 15 and demand its cancellation unless issued in accordance with such requirements. *If procured when prescribed qualifications have no existence in fact it is illegally procured; a manifest mistake by the judge can not supply these nor render their existence non-essential.* [Italics mine.]

The judgment of the Circuit Court of Appeals should be reversed and the cause remanded to the District Court with directions to entertain the Government's petition for cancellation of the certificate of citizenship.

JOHN W. DAVIS,
Solicitor General.

JULY, 1917.

○

No. 284

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917

THE UNITED STATES, PETITIONER

vs.

IVER INGEBRETSEN NESS

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit

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BRIEF FOR IVER INGEBRETSEN NESS

STATEMENT

No claim has ever been made that the Petition for Naturalization filed by the appellee in the District Court of Iowa, for Palo Alto County, was not (save in respect to the certificate of arrival) in proper form. The claim is that because a Certificate of Arrival was not secured from the Department of Commerce and Labor and attached thereto, that there was no jurisdiction in the District Court of Palo Alto County, Iowa, to hear and determine said Petition for Naturalization. The Government does not claim and has offered no proof that this Petition for Naturalization did not contain all of the data required by Section 4 of the Act of June 29, 1906, (1911 Supplement to Compiled Statutes, pages 529-531) except that referred to in the last clause of the second sub-division of said Section, which is as follows:

> "At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Depart-

ment of Commerce and Labor, if the petitioner arrives in the United States after the passage of this Act, stating the date, place and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition."

The position of the government is that the District Court of Palo Alto County, Iowa, had no jurisdiction to act upon the Petition in the absence of such certificate. This, of course, assumes the premise that no possible explanation could be made, or proof submitted, sufficient to excuse the failure to file such certificate. The argument for the government assumes that the applicant for naturalization could by no amount of proof that he was not at fault because the Department of Commerce and Labor did not or would not furnish such certificate, satisfy the court passing upon such Petition for Naturalization that he was entitled to a hearing in the absence of such certificate. We understand that the government does not question but that it availed itself on the hearing of the Petition for Naturalization before the District Court of Palo Alto County, Iowa, of the provisions of Section 2 of the Act of June 29, 1906, which is as follows:

"Sec. 2. That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings."

In the agreed statement of facts, it was stipulated:

"That prior to the hearing on the petition for naturalization which the said defendant filed in the District

Court of Palo Alto County, Iowa, M. R. Bevington, Chief Naturalization Examiner of the Department of Commerce and Labor, for and on behalf of his department, and at its direction, filed with the Clerk of the District Court in and for Palo Alto County, Iowa, aforesaid, a Motion, which was captioned: 'In the District Court of Palo Alto County, Iowa, In the Matter of the Petition for Naturalization of Iver Ingebretsen Ness,' and in which motion the said M. R. Bevington for and on behalf of his Department, stated and enumerated objections to the granting of the said Petition for Naturalization, for the following reasons:

"That the Petition for Naturalization should not be granted, but should be dismissed upon the ground that the said Petition was not supported by a Certificate of Arrival, as required by the Second Sub-Division of Section 4, of the Naturalization Act of June 29, 1906, and in said Motion the said M. R. Bevington called to the attention of the Court certain decisions or authorities, which the said M. R. Bevington stated and contended supported his position taken in the said motion, moving and requesting the dismissal of said Petition for Naturalization upon the said grounds aforesaid.

"That the said Motion was accompanied by a letter directed to the Clerk of the District Court of Palo Alto County, Iowa, which letter requested the said Clerk to call said motion to the attention of the court at the same time the petition was presented to and considered by the said District Court of Palo Alto County, and the Clerk in obedience to the direction and request contained in said letter, did attach said Motion and Citation of Authorities to the said Petition for Naturalization, and the same was presented to the court at the same time the said Petition for Naturalization was presented to the Court and considered by it. And said Motion and authorities were considered by the District Court of Palo Alto County, Iowa, and said Motion was by the said

court overruled and denied, and after the evidence of the petitioner and his witnesses were heard, the prayer of the Petition for Naturalization and for a Certificate was granted by the said District Court of Palo Alto County, Iowa."

Transcript of Record, pages 15-16.

The agreed statement of facts shows that evidence was offered and received in the District Court of Palo Alto County, Iowa, in explanation of the fact that no Certificate of Arrival was furnished by the Department of Commerce and Labor. (See Record, pages 6-17.)

It thus appears that the proceeding for naturalization in the District Court of Palo Alto County, Iowa, was one in which there was an appearance for the government and a formal presentation of the claims which are in the instant proceeding presented by the government as grounds for the cancellation of the Certificate of Naturalization. In other words, the District Court of the United States for the Northern District of Iowa, was asked to reconsider the same objections which were interposed by the government at the time the original petition of naturalization was heard, and to relitigate the same question in that forum, instead of proceeding by an appeal or writ of error from the decision of the District Court of Palo Alto County, Iowa, from the decision overruling the objections, interposed in tnat court.

No claim is made that the procedure adopted by the representatives of the Department of Commerce and Labor before the District Court of Palo Alto County, Iowa, by Motion, Objections and filing of Brief and Citation of Authorities, was not appropriate to align the government as an adverse party at the hearing of the original Petition for Naturalization. The question of law involved, was fully presented by the government and considered by that court, and a decision made. The proceeding therefore was not an *ex parte* proceeding.

This case is one in which the government was represented

at the original hearing in the court where the Petition for Naturalization was filed.

An important question is whether or not the term "illegally procured," as used in the Act, is intended to refer to a mere informality.

The Petition for Citizenship is required to state various facts in reference to the name, place of residence, etc., of the petitioner; the place from which he emigrated, and the date and place of his arrival in the United States.

The provision requiring the petitioner for naturalization to file the Certificate of Arrival, provided for in the Act, is no more imperative than the provision that he shall file his petition in duplicate.

The Act also provides that the petitioner shall sign the application in his own handwriting.

The wording of the Statute is such that it is not clear that the petitioner is the one whose duty it is to file the certificate from the Department of Commerce and Labor. The Statute reads as follows:

> "At the time of filing his petition *there shall be filed* with the Clerk * * * a certificate, etc."

It may well be held, as was said in the case *In re Schmidt,* 207 Fed. Reporter, 228, that the provision of Section I of the naturalization act really *imposes upon the Commissioner of Immigration* the duty of recording the requisite data for registry upon the arrival of the alien.

I

THE FAILURE TO ATTACH A CERTIFICATE OF ARRIVAL (THERE BEING NO MISCONDUCT IN RESPECT THERETO UPON THE PART OF THE PETITIONER) CANNOT CONSTITUTE THE "ILLEGAL PROCUREMENT" CONTEMPLATED BY THE ACT OF CONGRESS. THE TERM "ILLEGALITY" AMOUNTS TO SOMETHING MORE THAN A MERE MATTER OF PROCEDURE.

We wish a little later to consider more at length the meaning intended by Congress in the use of the phrase "illegally procured" found in Section 15 of the Act. As preliminary to that discussion we call attention to the many conditions in the second sub-division of Section 4 of the Act (1911 Supplement U. S. Compiled Statutes, pg. 529-530); it will be observed that this sub-division enumerates the following requirements:

> (1). Not less than two years nor more than seven years after the declaration of intention the alien must make and file his petition which is required to be (a) made and filed in duplicate, (b) a petition in writing, (c) signed by the applicant in his own handwriting, (d) duly verified.
>
> (2). The petition is required to state various facts in reference to the name, place of residence, etc., the place from which the alien emigrated, and the date and place of his arrival in the United States. There are many other conditions. We call attention to a few which so far as the Statute reads are of the same weight and force as the requirement, with which the second sub-division concludes. The provision requiring the petitioner for naturalization to file a certificate is no more imperative than the provision that he shall file his petition in duplicate, or that it shall be signed

by the applicant in his own handwriting. One is no more mandatory than the other. Indeed the wording of the Statute would seem to indicate that the petitioner may not be the one whose duty it is to file the certificate from the Department of Commerce and Labor. The Statute reads as follows: "At the time of filing his petition *there shall be filed* with the Clerk * * * a certificate, etc." So far the obligation to file such certificate seems not to be imposed personally upon the petitioner. The latter part of the clause requires the certificate and declaration to be attached to and made a part of the petition. The case *in re Schmidt,* 207 Fed. Reporter, 228, calls attention to the fact that the provision of Section 1 of the naturalization act really *imposes upon the Commissioners of Immigration* the duty of recording the requisite data for registry upon the arrival of the alien. And it concludes, "and it shall be the duties of said Commissioners of Immigration to cause to be granted to such alien a certificate of such registry with the particulars thereof." This is held not to be the certificate of arrival required by the act.

As we have heretofore indicated the case of *United States vs. Lenore,* 207 Federal Reporter 865, holds that the provision that the petition shall be signed by the petitioner in his own handwriting does not render void or illegal a judgment granting naturalization based upon a petition not so signed; and that a certificate of natuarlization obtained in such case is not illegally procured.

In the case of *United States vs. Stoller,* 180 Fed. Reporter 910, the provision that the petition is to be signed in duplicate is held to be directory and that a certificate of naturalization granted in such a case is not illegally procured.

In the case of *United States vs. Anderson,* 169 Fed. Reporter 201, 205, the suit to cancel was brought upon the ground that the court granting the naturalization was without jurisdiction because the petitioner was a citizen of a

different county from that in which the court was sitting. One of the suggestions of the court approved by Judge Amidon and by Judge Whitman is as follows:

> "This is not an application for relief against the judgment of another court, procured by fraud of misrepresentation of facts not known to be untrue. But the petition here this court is asked to review merely a legal conclusion, deliberately adopted by a court of coordinate jurisdiction, upon a question arising upon the same facts as are here presented, and virtually to send its process in that court requiring it to vacate and set aside its own judgment. Such a function is in its nature revisory, and necessarily implies superiority, which, under the general provisions of the law, this court does not possess. *Little Rock Junction Ry. vs. Burke,* 66 Fed. 83, 13 C. C. A. 341; *Blythe vs. Hinckley,* 173 U. S. 501, 19 Sup. Ct. 497, 43 L. Ed. 783."

We have already called attention to the fact that Judge Amidon in the case of *United States vs. Lenore,* 207 Federal Reporter 865, 868, says: "To say that a certificate which is issued pursuant to a full hearing in court is 'illegally procured' if any error occurs in the proceeding would be a wide departure from the language which courts have been accustomed to use in reference to judicial error; *illegally procured imports, not an error of court, but wilful misconduct on the part of the holder of the certificate or those who have acted in his behalf.*" It is to be noted that Judge Amidon assumes that the illegal procurement has to do with the misconduct of the petitioner for naturalization. But in this case the illegal procurement is sought to be applied to the action of the court. If notwithstanding the petitioner honestly states the fact and the court before whom the petition is filed erroneously interprets the law upon a hearing in which the claims of both sides are duly and formally presented it would seem clear that the expression "illegally procured" can have no application.

The term "illegality" as applied to the action of a court in the jurisprudence of this country has had for a long time a definite and distinct meaning; and instead of meaning as is contended by counsel for the government *error of law or irregularity in proceeding,* it has been distinctly held to have application only to such a radical defect as renders the proceedings of the court void. In the case of *Barton vs. Saunders,* 16 Pacific Reporter 921, 8 Am. St. Reports 261, 264, the Oregon Court contrasting the expressions "irregularity" and "illegality," said:

> "An irregularity is defined to be 'the want of adherence to some prescribed rule or mode of proceeding, and it consists either in omitting to do something that is necessary for the due and orderly conducting of a suit or doing it in an unreasonable time or improper manner.' Tidd's Practice, 434, 'It is the technical term for every defect in practical proceedings, or the mode of conducting an action or defense, as distinguished from defects in pleadings. On the other hand, illegality is properly predictable of radical defects only, and signifies that which is contrary to the principles of law as distinguished from mere rules of procedure. It denotes a complete defect in the proceedings.' "

The term illegality amounts to something more than a mere matter of procedure. *Ex parte Mooney,* 26 W. Va. 36, 53, Am. Reports 59, 62. In *ex parte Gibson,* 91 American Decisions 546, 550, after defining irregularity or error the court contrasts with illegality, and says:

> *"On the contrary, illegality can be affirmed only of radical defects, and signifies that which is contrary to the principles of law as distinguished from rules of procedure. Illegality denotes 'a complete defect in the proceedings.'* Tidd's Practice, 435. Mr. Hurd illustrates the distinction between mere error or irregularity

which would render a judgment voidable, *and an illegality which would render a judgment void,* thus: 'It would be irregular to sentence a man to imprisonment in his absence, where the absence was occasioned by the order of the court pronouncing the sentence. It would be illegal to sentence him to imprisonment for a crime which was punishable by a pecuniary fine only.' Hurd on *Habeas Corpus,* 333.

In view of this distinction, the question is: Is the judgment in this case 'contrary to the principles of law as distinguished from the rules of procedure?' or is there a 'complete defect' in it? or is there something which the law deems material and requires to be stated, which is altogether omitted?' "

In *ex parte Goodwin,* 67 Missouri 637, 642-3, we find the following definition:

"A proceeding defective for irregularity and one void for illegality may be reversed upon error or certiorari, but it is the latter defect only which gives authority to discharge on *habeas corpus.*" And, after giving the usual definition of irregularity, the author proceeds (p. 328): Illegality is, properly, predicable or radical defects only, and signifies that which is contrary to the principles of law as distinguished from mere rules of procedure. It denotes a 'complete defect in the proceedings.' "

The same definition may be found in *ex parte Schwartz,* 2 Texas Appeals, 80; *State vs. Norton,* 48 Southwestern, 464-465 (S. C.) and see 17 A. & E. Ency., 482 and cases cited.

In the *Plaistow* case, 189 Fed. Reporter 1006, 1010, Judge Hazel cites *Tiedt vs. Carstenson,* 61 Iowa, 334, to the point that the term "illegally procured" is not limited to irregularity of procedure, Judge Hazel intimating that it applies

to any error of the court and this is the gist of the holding of that judge. But we find *Tiedt vs. Carstensen* is holding the exact contrary. We quote from the decision:

> "In a word, if a tribunal, when determining matters before it which are within its jurisdiction, proceeds in a manner contrary to law, it acts illegally. But if a discretion is conferred upon the inferior tribunal its exercise cannot be illegal. *If it be clothed with authority to decide upon facts submitted to it, the decision is not illegal, whatever it may be, if the subject-matter and the parties are within its jurisdiction for the law entrusts the decisions to the discretion of the tribunal.* From this brief satement it will be plainly seen that the Statute does not contemplate that decisions of inferior tribunals upon questions of fact may be reviewed by the writ of certiorari. The distinction between erroneous proceedings which are termed 'Illegalities' and erroneous decisions of facts, are obvious.'"

That such is the construction of the holding in *Tiedt vs. Carstensen* by the Supreme Court of Iowa Appeals in a later case, *Finn vs. Winneshick District Court,* 145 Iowa, 157, 164, where the Court quotes the paragraph above set out as indicating the difference between an erroneous and an illegal order. And in the case of *Witmer vs. Polk County District Court,* 155 Iowa, 244, 249, it is stated that the question of illegal action cannot be reviewed on certiorari there being no question of jurisdiction of the Court over the proceedings. And the same view was taken of this decision in *Olwein vs. Walrath,* 144 Northwestern, 600, 601.

II

THE FAILURE TO ATTACH A CERTIFICATE OF ARRIVAL DID NOT DEPRIVE THE COURT OF JURISDICTION TO HEAR AND DETERMINE THE PETITION FOR NATURALIZATION.

That the omission of some fomality which does not deprive the Court of jurisdiction to act is not an illegality in the procurement of a judgment is usually recognized, and upon principle it appears must be the law.

Judge Whitson in the *United States vs. Stoller,* 180 Federal Reporter, 910, 913, that being a case where the petition was not filed in duplicate, said:

> "*Judge Dietrich in the United States vs. Anderson,* (D. C.) 169 Fed., 201, in expressing practically the same view, also regarded it as a matter of delicacy for one court to thus question the decree of another. He suggested that opportunity is open by way of appeal from the decision of state courts instead of application to the federal courts for the correction of errors; for it is to be remembered, was there pointed out, that those courts cannot exercise appellate jurisdiction. The court whose action is here complained of can as rightfully supervise a judgment of this court as it can a judgment of that court. The Statute provides that certificates may be canceled 'on the ground of fraud or on the ground that such certificate of citizenship was illegally procured.' The sense in which the illegality mentioned is to be understood is something of a more serious nature than the omission to strictly comply with directory provisions of the Statute."

Judge Dietrich in the case of the *United States vs. Anderson,* 169 Fed., 201, 205, referred to the contention that it was intended in the act of congress to revise the judgments of

another court aside from cases where fraud or illegality was practiced upon that court and sustained a demurrer to a bill charging that the naturalization was illegally procured by misrepresentation as to the County of the residence of the applicant.

In the case of the *United States vs. Lenore,* 207 Federal Reporter, 865, the point was whether a signature by mark instead of by handwriting involved a condition precedent so that the judgment admitting the applicant to naturalization could be assailed in this kind of proceedings, and it was held that it could not be so assailed. This decision directly contrary to the *Doller* case holds that the remedy be by appeal and not by such separate proceeding.

In the last cited case Judge Amidon (207 Federal Reporter, 865, 868-9) referring to the necessity for correcting the ordinary errors of courts committed in the honest exercise of their jurisdiction by appeal or writ of error, said:

> "I concur in the view expressed in *United States vs. Luria,* (D. C.) 184 Fed., 643, 646, that 'illegally procured' does not mean that the certificate was issued through error of law. Errors of courts, committed in the honest exercise of their jurisdiction under the naturalization laws, must be corrected the same as in other cases by appeal or writ of error. Such a method of review has been recognized in the Circuit Courts of Appeal of most of the circuits. *United States vs. Balsara,* 180 Fed. 694, 103 C. C. A. 660 (2nd Circuit); *Bessho vs. United States,* 178 Fed. 245, 101 C. C. A. 605 (4th Circuit); *United States vs. Poslusny,* 179 Fed. 836, 103 C. C. A. 324 (2nd Circuit); *United States vs. Martorana,* 171 Fed. 397, 96 C. C. A. 353 (3rd Circuit); *United States vs. Doyle,* 179 Fed. 687, 103 C. C. A. 233 (7th Circuit); *United States vs. Ojala,* 182 Fed. 51, 104 C. C. A. 491 (8th Circuit).'"

And answering the contention of the court of appeals in the *Dolla* case that a naturalization proceeding was not "a case," Judge Amidon observed:

> "In *United States vs. Dolla*, 177 Fed. 101, 100 C. C. A. 521, 21 Ann. Cas. 665, it was held by the Circuit Court of Appeals of the Fifth Circuit that the proceeding for the naturalization of an alien did not constitute 'a case' so as to permit a review by appeal or writ of error in the Circuit Court of Appeals. This decision has never been cited, and seems to be out of accord with the practice in other circuits. In my judgment it proceeds upon an erroneous interpretation of the statute. The hearing in court by which aliens are naturalized must be an exercise of judicial power. Otherwise Congress could not confer that authority upon Federal Courts. *Muskrat vs. United States*, 219 U. S. 346, 31 Sup. Ct. 250, 55 L. Ed. 246. Again, it has been uniformly held that judicial power can be exercised in the federal courts only when the proceeding takes the form of 'a case' or 'controversy' within the meaning of those terms as used in the judicial article of the Constitution. Of these terms the word 'case' is the more comprehensive."

Jurisdiction attached upon the filing of the petition which invoked the jurisdiction of the court. A defective petition cannot be ignored and treated as none at all. A defective petition must ordinarily confer upon the court the authority to determine whether or not it is sufficient in form and substance. There is a broad distinction between the power to decide and the exercise of judicial discretion. In 12 Ency. P. & P., 119, the rule is stated as follows:

> "Power may exist although it be not proper to exercise. Thus although the decrees of a court of equity might not be void for want of jurisdiction, yet it is not

always proper for the court to exercise its jurisdiction when its aid is invoked.

"The boundary between an error of judgment and the usurpation of powers is this: the former is reversible by an appellate court within a certain fixed time, and is therefore only voidable, while the latter is an absolute nullity, and when one attacks proceedings thereafter in the litigation, though erroneous, cannot operate to divest it, but the judgment is binding until reversed. This principle has been laid down in the forcible expression that the power to decide necessarily carries with it the power to decide wrongly as well as rightly, and is subject to the qualification that the court can render only such judgment as does not transcend in extent or character the law which is applicable to that class of cases."

And in 12 Ency. P. & P., 197-200, the authority says:

"ERRORS OF JUDGMENT OR IRREGULARITY. When jurisdiction has once attached, the court has a right to decide every question arising in the case, and errors of judgment or irregularities, however gross, which do not render the judgment absolutely void, are not available on collateral attack, but the judgment is valid until reversed or vacated by direct proceeding. In such cases the only thing to be considered is whether the court whose proceedings are brought in question collaterally had jurisdiction and power to pass the judgment or decree, and mere irregularities which do not affect the jurisdiction are no more available than erroneous judgments."

In the case of *Reed vs. City of Muscatine*, 104 Iowa, 183, 185, the Court said:

"As said by Judge Elliott in his work on General Practice (volume I, section 240): 'Where there is authority to make a judicial inquiry, there is jurisdiction,

and it is evident that this authority exists wherever there is power over a general class of cases.' The distinction is also pointed out in Brown, Jurisdiction, section 10. Objections to the jurisdiction of the general subject may be made at any stage of the proceedings, for they cannot be waived. But, as a general rule, if there is jurisdiction of the general subject there may be waiver of objections to the jurisdiction of the particular subject. That is to say, if the court has the right to decide the general class of cases to which the one in question belongs, its decision, although erroneous, cannot be collaterally attacked, and, if no objection or exception be taken it will be considered as waived. The difference between a right to decide and a right decision clearly and briefly illustrates the distinction we are trying to elucidate. We have a case where there is unquestioned authority over the general subject, but it is claimed that there is no jurisdiction of the particular case, because of the absence of allegations as to notice. Such objections does not go to the jurisdiction of the subject-matter but rather to the correctness of the decision in the particular case, and cannot be raised for the first time in this court. The case is quite like that of *Sheel vs. City of Appleton*, 49 Wis. 125 (5 N. W. Rep. 27), wherein it is held that failure to give notice simply affects the plaintiff's right to sue, and does not deprive the court of jurisdiction of the subject-matter."

Section 3172 of the Code of Iowa provides that petitions in divorce cases *must* state certain matters therein required: Section 3173 declares "the petition *must* be verified by the plaintiff." And there are other similar statutory provisions.

In the case of *Mengel vs. Mengel*, 145 Iowa, 737-740-1, the language referred to is construed, and the effect of these

provisions upon a decree rendered on pleadings not in compliance therewith is discussed by the court as follows:

> "The failure to allege in the petition for divorce that the application was made in good faith and for the purpose set forth in the petition did not deprive the court of jurisdiction to grant relief. The pleading could have been attacked on that ground, but it was for the defendant to raise such objection at the proper time and in the proper manner. Insufficiency of a pleading does not defeat the court's jurisdiction of the case unless there is some express statutory provision to that effect. *Reed vs. Muscatine,* 104 Iowa, 183; *Kennedy vs. Roberts,* 105 Iowa, 521. Errors of law, which might be corrected on appeal, had proper proceedings for the purpose been taken, cannot be made the ground for collateral attack upon the judgment. *Griffith vs. Milwaukee Harv. Co.,* 92 Iowa, 634; *Fulliam vs. Drake,* 105 Iowa, 615. And see *Ex Parte Yarbrough,* 110 U. S., 651 (4 Sup. Ct. 152, 28 L. Ed. 274) wherein it is held that the court cannot convert an independent proceeding into a writ of error by which errors of law committed by the court having jurisdiction may be inquired into. The requirement that, in a petition in an action for divorce, it must be alleged that the application is in good faith, is mandatory; but it is no more explicit than the requirement in Code, Section 3173, that the petition must be verified, and it has been held by this court that failure to verify such a petition does not deprive the court of jurisdiction or render subsequent proceedings invalid. *McCraney vs. McCraney,* 5 Iowa, 231; *Ellis vs. White,* 61 Iowa, 644; *Van Duzer vs. Van Duzer,* 65 Iowa, 625."

In the case of *Hall vs. Law,* 102 U. S., 461, 26 L. Ed., 217, 218, the court is considering the validity of a judgment in a

case in which no complaint or petition is found. We quote from the decision of the Supreme Court:

> "The validity of this partition is assailed because no complaint or petition of the applicant for the partition appears in the record as the foundation of the proceedings, and without one it is contended that they were void.
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> * * * * * * *
>
> "The recitals in the order show a compliance with the Statute; they show jurisdiction in the court over the subject. That jurisidiction arises upon the presentation of the application, accompanied with proper proof of previous notice of it. The order of the court appointing the commissioners is a determination that the application is sufficient, and that due notice of it has been given. This conclusion is not open to collateral attack; it can only be questioned on appeal or writ of error, by a superior tribunal invested with appellate jurisdiction to review it.
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> * * * * * * *
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> "But the court did not hold or intimate that the order and subsequent proceedings were, from the defective character of the petition, absolutely void. It was the common case of the reversal of proceedings because of intervening error. If not thus corrected, the existence of the error in no respect impairs the validity and efficacy of the subsequent proceedings, or the order or judgment thereon. The distinction between erroneous and void orders and judgments is too familiar to call for extended observation, and is fully recognized, not only in the courts of Indiana, but in those of every State in the Union."

It has many times been held by the inferior Federal Courts and by the Supreme Court that defects in affidavits and process and informalities in connection therewith ordinarily are

mere irregularities and not jurisdictional defects. *Pennoyer vs. Neff*, 95 United States 714, 24 L. Ed. 565; *Kilbourne vs. Thompson*, 103 United States 198, 26 L. Ed. 389; *Applegate vs. Lexington Mining Company*, 17 United States 271, 29 L. Ed. 897; *Cole vs. Cunningham*, 133 United States 112, 33 L. Ed. 541; *Simmons vs. Saul*, 138 U. S. 439, 34 L. Ed. 1054.

III

THE GINSBERG CASE IS WHOLLY DIFFERENT IN ITS FACTS FROM THE PRESENT CASE.

In the case of the *United States vs. Ginsberg*, 243 U. S. 472, one of the two questions certified by the Court of Appeals was stated as follows:

"May a certificate of citizenship be set aside and cancelled in an independent suit brought under Section 15 of the Act of June 29, 1906, Charter 3592, on the ground that it was illegally procured, if the uncontradicted evidence at the hearing of the petition showed indisputably that the petitioner was not qualified by residence for citizenship and that the Court or Judge, who heard the petition and ordered the certificate cancelled, misapplied the law and the facts?"

It was in response to the question so stated that this court announced the rule which is quoted in the brief on behalf of the Government. It is merely held that where there is a total want of the essential qualifications for citizenship and such certificate is nevertheless granted it is "illegally procured." As stated by the court, the certificate of citizenship "if procured when prescribed qualifications have no existence in fact, it is illegally procured."

We submit that under familiar principles the rule announced must be read in the light of the question before the court, and the case which was considered one in which the petitioner for citizenship was by uncontradicted evidence at the hearing of the petition shown not qualified by residence

for citizenship; a case, in which it was indisputably shown that both the law and the facts were misapplied by the court that granted the certificate.

The Solicitor General has rested his entire claim of error upon the contention that the case at bar is ruled by the decision in the Ginsberg case.

It is a matter of some interest to know that the questions which were certified in the Ginsberg case were certified by the Court of Appeals for the Eighth Circuit—the same court to which the writ of certiorari in this case was issued. That court was in no doubt that the case at bar stood upon a wholly different footing from the Ginsberg case. In the opinion in the case at bar the Court of Appeals pointed out a distinction between the essential disqualification for citizenship arising from a want of residence for five years, and a mere informality such as the failure to file the certificate of arrival from the Department of Commerce and Labor; a certificate which could not be obtained by Ness through no culpable fault of his.

The Court of Appeals said:

> "Moreover, the filing of the certificate of entry was not, like the declaration of intention, the proof of moral character, the renunciation of allegiance, the residence of five years, an essential qualification of admission to citizenship."

And again the court observed:

> "There is a wide difference between a mistaken disregard of a provision, with reference to the form of pleadings, or the manner of procedure, which are always largely in the discretion of the trial court, and a mistaken disregard of the requirement of an essential qualification of admission to citizenship, such as the declaration of intention, the residence in the United States for five years, the renunciation of allegiance to any foreign

> sovereignty. The former is a mere irregularity; the latter an illegality. Illegality signifies that which is contrary to the established principles of the law."

The Solicitor General makes no attempt to answer this argument. Obviously there is a distinction between a mere "irregularity" and an "illegality." The definition of the Court of Appeals in the present case, viz.: "Illegality signifies that which is contrary to the established principles of the law," would seem to be as a construction of the naturalization act, sufficiently favorable to the Government. Surely the term "illegality" should not be so broadly applied as to make a mere informality a sufficient ground for the annulment of a certificate of citizenship.

Certain essential conditions as to citizenship are prescribed by the law. Certainly no one would question that the requirement for a residence of five years is essential. In the Ginsberg case *the actual physical residence was less than two months.* It would be hard to find a clearer case of want of an essential condition for admission to citizenship.

On the other hand, if it is conceded that the grant of the certificate of citizenship can be said to be legally procured in contra-distinction to being illegally procured, notwithstanding some formality has not been followed, it would be difficult to find a better illustration of such case than the present one affords. Here the Government complains of the failure to attach to the petition a certificate of the Department of Commerce and Labor showing the date and place of arrival of the petitioner.

There is no doubt at all that, as said by the Circuit Court of Appeals:

> "Ness entered this country without any notice or knowledge that the certificate of entry was required and as the officers of the Department of Commerce and Labor did not know when he entered they could not give him a certificate on their own knowledge, and if

one were given it must be on his statement, or on the statement of some other witness who knew. Ness possessed every essential qualification for admission to citizenship. He had declared his intention to become a citizen and to renounce his allegiance and fidelity to any foreign sovereignty two years before he applied for admission to citizenship. He satisfied the court by the testimony of witnesses that he had resided in the United States five years; that during this time he had behaved as a man of good moral character attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same. He declared on oath at the time of his admission that he would support the Constitution of the United States and that he abjured all allegiance and fidelity to every foreign sovereignty. He proved all these facts in the Iowa court and in the court below. He was frank and truthful, and he submitted to those courts on this evidence the question whether or not he could be legally admitted to citizenship, and they both decided that he could be."

Also as said by the Court of Appeals, he "truthfully pleaded and conclusively proved all of the facts" which could be shown by said certificate of arrival.

He showed that he had no knowledge at the time he entered the United States of the regulations concerning emigration and was unacquainted with any requirement on the part of the railway company, over whose road he traveled, to ascertain from him that he was an emigrant destined for some point within the United States. He did not conceal himself upon the train, and he saw no person who was, or purported to be, an immigration inspector. He merely remained on the train and passed into the United States. Upon learning that he should have had a certificate of arrival and that he should have paid the alien head tax, he presented himself for medical examination long before he made

his application to be admitted as a citizen, and after correspondence with the immigration authorities, traveled a distance of several hundred miles in an attempt to submit himself for medical examination and to pay the alien head tax (Record, pages 16 and 17). He proved all of these facts fully and fairly in the Court in which he was admitted to citizenship. The attention of the court was directed by the representations of the Government to the informality now sought to be made the basis for the revocation of his certificate.

Surely it is not contrary to the "established principles of the law" to ask a court, having full jurisdiction of petitions for admission to citizenship, whether or not the absence of a condition in the nature of a mere formality and pertaining merely to procedure, is a sufficient bar to his admission.

A large number of formalities are prescribed by the act. A certain number of copies of the petition must be verified and filed. Among other things, if the petitioner entered through a port, the name of the vessel on which he arrived must be stated. Suppose, for example, due to forgetfulness, or otherwise, the name of the vessel is not stated. This would be a failure to comply with one of the prescribed formalities. But suppose the attention of the court is by the Government directed to the failure and issue is joined upon the right to grant the petition notwithstanding the informality and in the court where application is made, the petitioner explains his inability to give the name of the vessel satisfactorily; in such case would it be argued that a suit might thereafter be brought and successfully prosecuted to set aside the certificate of citizenship?

The provision in the act of June 29, 1906, authorizing the cancellation of the certificate of citizenship "on the ground of fraud, or on the ground that such certificate of citizenship was illegally procured" was surely intended to narrow the right to bring suit for the cancellation of the certificate within limits which would not bound such right if the statute provided that a suit to cancel could be maintained upon a

failure to comply with any of the formalities prescribed by law.

We are not unmindful of the language in the Ginsberg case that no alien has the right to naturalization unless all statutory requirements are complied with. But this does not necessarily measure the right to cancel a certificate of citizenship already granted. And this is recognized in the Ginsberg case in the statement that every certificate of citizenship must be treated as granted upon condition that the Government may challenge it *as provided in Section 15.* Section 15 authorizes the institution of the suit to cancel the certificate only on grounds of (1) fraud, and (2) illegal procurement. No fraud is charged in the present case, and the real question is as to whether the procurement of the certificate was an "illegal procurement."

This court held in the case of *Luria vs. United States,* 231, U. S. 9, 28, that the principles of equity jurisprudence are applicable to cases of this nature. This suggests that the trial of such case is not to be controlled by a mere suggestion of some perhaps highly technical informality pertaining to procedure, rather than substantive right. In that case this court declared that the act in question "does not make an act fraudulent or illegal that was honest and legal when done." And it was therein declared that the act at most "provides for the annulment by appropriate judicial proceedings of *merely colorable letters* of citizenship to which their possessors never were lawfully entitled."

But the letters of citizenship held by Ness were never of the merely colorable character. There was no obvious error of law or serious mistake of facts in the judgment of the court granting the petition for naturalization.

In conclusion we suggest that the Solicitor General is in error in assuming as he does in the concluding paragraph of his argument that the lower court refused "to entertain" the petition of the Government. The case was in fact tried on its merits. We respectfully submit that it was rightly decided.

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BERTRAM J. PRICE.

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